(6)

No. 98-5881

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

JOINT APPENDIX
VOLUME II, Pages 298 to 616

IRA S. SACKS
(*Counsel of Record*)
HECTOR O. VILLAGRA
LETICIA M. SAUCEDO
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
One New York Plaza
New York, New York
10004-1980
(212) 859-8000
Counsel for Petitioner

MARK L. EARLEY
Attorney General of
Virginia
KATHERINE P. BALDWIN
Assistant Attorney General
(*Counsel of Record*)
Commonwealth of Virginia
Office of Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Respondent

Petition For Certiorari Filed September 2, 1998
Certiorari Granted November 9, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Table of Contents

Benjamin Lee Lilly v. Commonwealth of Virginia

Volume I

Volume II

LT. R.L. HAMLIN: THIS IS LT. RON HAMLIN, MONTGOMERY COUNTY SHERIFF'S OFFICE. TODAY'S DATE IS DECEMBER 6, 1995. TIME IS 2:00 A.M. PRESENT DURING THIS INTERVIEW WILL BE INVESTIGATOR BOB FLEET, MONTGOMERY COUNTY SHERIFF'S OFFICE. WE'LL BE TALKING TO MARK LILLY, WHO LIVES IN RINER. FIRST OFF, I'M GOING TO ADVISE MR. LILLY OF HIS MIRANDA RIGHTS. YOU HAVE THE RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AS EVIDENCE IN A COURT OF LAW. YOU HAVE THE RIGHT TO TALK TO A LAWYER, AND HAVE HIM PRESENT WITH YOU WHILE YOU'RE BEING QUESTIONED. IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING, IF YOU WISH. IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. DO YOU UNDERSTAND WHAT I JUST TOLD YOU?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: YOU DO UNDERSTAND?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY, WOULD YOU SIGN RIGHT HERE, PLEASE?

(PAUSE)

LT. R.L. HAMLIN: OKAY, MARK, WE UNDERSTAND SOME THINGS HAPPENED TODAY. WELL, IT'S PASSED, IT'S YESTERDAY NOW, ON 12/5. WE NEED

TO TALK TO YOU ABOUT WHAT'S HAPPENED YESTERDAY AND LED UP TO WHY WHAT WE'RE HERE RIGHT NOW AT 2:30 IN THE MORNING, OKAY?

MARK A. LILLY: ALL RIGHT.

LT. R.L. HAMLIN: IF YOU WOULD, LET'S TALK ABOUT HOW DID YESTERDAY START OFF?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: SIR?

MARK A. LILLY: I WAS DRUNK.

LT. R.L. HAMLIN: YOU WERE DRUNK YESTERDAY?

MARK A. LILLY: YEAH. DRUNK AS I EVER BEEN. WE PARTIED ALL NIGHT THE NIGHT BEFORE.

LT. R.L. HAMLIN: WHAT'S YOUR MIDDLE NAME?

MARK A. LILLY: ANTHONY.

LT. R.L. HAMLIN: OKAY, WHO WERE YOU WITH YESTERDAY?

MARK A. LILLY: BEN AND GARY BARKER. BEN LILLY AND GARY BARKER.

LT. R.L. HAMLIN: WHERE DID YALL GET TOGETHER AT?

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: COME HERE AND SPEAK UP. I'VE GOT TO GET THIS.

MARK A. LILLY: BEN COME OVER TO THE TRAILER ABOUT 9 OR 10 IN THE MORNING. WE WAS STILL IN THE BED.

LT. R.L. HAMLIN: BEN CAME TO YALL'S TRAILER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: "YALL" IS BEN?

MARK A. LILLY: DO WHAT?

LT. R.L. HAMLIN: BEN IS YOUR BROTHER?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHERE'S THAT AT, WHERE DO YOU LIVE AT?

MARK A. LILLY: HOLLY COURT TRAILER PARK.

LT. R.L. HAMLIN: BEN LIVE THERE, OR IS THAT HIS PLACE OR YOURS?

MARK A. LILLY: NAH, IT'S JUST A PLACE ME AND GARY GO PARTYING. (INAUDIBLE)

LT. R.L. HAMLIN: HANG OUT SPOT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THAT'S YOU AND UH, BEN. WHAT DID YALL DO FROM THERE?

MARK A. LILLY: STARTED DRINKING.

LT. R.L. HAMLIN: STARTED DRINKING?

MARK A. LILLY: YEAH. WE ALWAYS GET SOMETHING TO DRINK.

LT. R.L. HAMLIN: THEN WHAT ELSE DID YOU GET IN TO?

MARK A. LILLY: WENT TO FLOYD COUNTY.

LT. R.L. HAMLIN: ABOUT WHAT TIME?

MARK A. LILLY: IT WAS DARK.

LT. R.L. HAMLIN: IT WAS DARK?

MARK A. LILLY: YEAH. IT WAS, DRANK BEER, LIQUOR ALL DAY.

LT. R.L. HAMLIN: ABOUT WHAT TIME DID YOU GO TO FLOYD THEN, ABOUT FIVE? OR A LITTLE AFTER, FIVE-THIRTY?

MARK A. LILLY: YEAH, GIVE OR TAKE.

LT. R.L. HAMLIN: ALL RIGHT, WHAT DID YOU GO TO FLOYD FOR?

MARK A. LILLY: WE BROKE INTO A PLACE.

LT. R.L. HAMLIN: BREAK INTO A PLACE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHOSE PLACE WAS IT?

MARK A. LILLY: I DON'T KNOW. I DON'T, I BARELY EVEN REMEMBER IT.

LT. R.L. HAMLIN: WAS IT A HOUSE OR A STORE?

MARK A. LILLY: A HOUSE.

LT. R.L. HAMLIN: ALL RIGHT, HOW DID YOU GET OVER TO FLOYD?

MARK A. LILLY: UH, THE COUGAR, MERCURY COUGAR.

LT. R.L. HAMLIN: WHOSE CAR IS THAT?

MARK A. LILLY: IT'S BEN'S.

LT. R.L. HAMLIN: WHO WAS DRIVING?

MARK A. LILLY: UH, I DON'T KNOW.

LT. R.L. HAMLIN: YOU DON'T REMEMBER WHO WAS DRIVING?

MARK A. LILLY: NO, I ALWAYS RIDE IN THE BACK.

LT. R.L. HAMLIN: DID THAT CAR BELONG TO BEN?

MARK A. LILLY: UH-HUH.

LT. R.L. HAMLIN: YOU REMEMBER BREAKING INTO THE HOUSE?

MARK A. LILLY: NOT REALLY, NO.

LT. R.L. HAMLIN: DO YOU KNOW WHO BROKE IN? DID YOU GO INSIDE THE HOUSE?

MARK A. LILLY: UH, I GUESS.

LT. R.L. HAMLIN: YOU WENT INSIDE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL OF YOU GO IN?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT DID YOU TAKE FROM THE HOUSE?

MARK A. LILLY: LIQUOR.

LT. R.L. HAMLIN: WHAT ELSE?

MARK A. LILLY: GUNS.

LT. R.L. HAMLIN: GUNS? WHAT KIND OF GUNS?

MARK A. LILLY: UH, THREE. A PISTOL AND SOME RIFLES.

LT. R.L. HAMLIN: TOOK ONE PISTOL? AND A RIFLE?

INV. R.F. FLEET: TWO RIFLES.

LT. R.L. HAMLIN: TWO RIFLES? THAT IT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND LIQUOR.

MARK A. LILLY: AND LIQUOR.

INV. R.F. FLEET: ANYTHING ELSE YOU CAN THINK OF?

MARK A. LILLY: NOT THAT I CAN THINK OF. I WAS SO DRUNK. I WAS DRUNK WHEN YOU BROUGHT ME IN HERE AT 1:30 THIS MORNING.

INV. R.F. FLEET: HOW YOU FEEL NOW?

LT. R.L. HAMLIN: WAS IT. . . .

MARK A. LILLY: I FEEL ALL RIGHT.

INV. R.F. FLEET: YOU'RE ALL RIGHT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU KNOW WHERE YOU'RE AT?

MARK A. LILLY: YEAH, I'M IN JAIL.

INV. R.F. FLEET: WHERE AT?

MARK A. LILLY: IN GILES COUNTY.

LT. R.L. HAMLIN: OKAY, ONCE YOU LEFT FLOYD WHERE DID YOU GO?

MARK A. LILLY: I DON'T EVEN REMEMBER. (INAUDIBLE)

LT. R.L. HAMLIN: YOU CAME STRAIGHT. . . . YOU DON'T REMEMBER COMING BACK FROM FLOYD? WHAT DO YOU REMEMBER NEXT? COME OVER HERE AND TALK.

MARK A. LILLY: DRUNK AS SHIT. THAT'S ALL I REMEMBER.

INV. R.F. FLEET: TELL US ABOUT WHAT HAPPENED AFTER YOU LEFT FLOYD, MARK.

LT. R.L. HAMLIN: WHEN YOU COME BACK TO MONTGOMERY COUNTY, WHAT DO YOU REMEMBER?

MARK A. LILLY: WE WENT BACK TO THE TRAILER AND DRANK SOME MORE LIQUOR.

INV. R.F. FLEET: THEN WHERE DID YOU GO?

MARK A. LILLY: UH, WENT TO GILES COUNTY FOR SOMETHING.

INV. R.F. FLEET: OKAY, AND WHAT HAPPENED THEN?

MARK A. LILLY: WE WERE IN SOMEWHERE OVER IN BLACKSBURG, THE CAR BROKE DOWN AND THE DUDE GOT ANOTHER CAR.

LT. R.L. HAMLIN: (INAUDIBLE)

INV. R.F. FLEET: TELL US ABOUT HOW THE DUDE GOT ANOTHER CAR.

MARK A. LILLY: PULLED OUT A GUN.

INV. R.F. FLEET: WHO WAS THE DUDE?

MARK A. LILLY: MY BROTHER.

LT. R.L. HAMLIN: ALL RIGHT, WHERE DID THIS HAPPEN AT?

MARK A. LILLY: STORE NEAR PRICE'S FORK (INAUDIBLE)

LT. R.L. HAMLIN: AND HOW COME HIM TO DO THAT?

MARK A. LILLY: DIDN'T WANT TO WALK I GUESS. (INAUDIBLE)

LT. R.L. HAMLIN: WHAT DID, WHAT HAPPENED TO THE COUGAR?

MARK A. LILLY: IT BROKE DOWN, MAN, THE BATTERY WENT DEAD. OH, YEAH, THE FUCKING TRANSMISSION WENT OUT.

LT. R.L. HAMLIN: ALL RIGHT, WHEN BEN, WHEN BEN PULLED THE GUN ON THE DUDE, WHERE WERE YOU AT?

MARK A. LILLY: STILL IN THE COUGAR.

LT. R.L. HAMLIN: YOU WERE STILL IN THE COUGAR? WHERE WAS GARY BARKER AT?

MARK A. LILLY: HE WAS STANDING BESIDE THE COUGAR.

LT. R.L. HAMLIN: YOU AND GARY WERE AT THE COUGAR?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: ALL RIGHT, WHAT HAPPENED THEN? WHAT DID YALL SEE HAPPEN?

MARK A. LILLY: WELL, BEN JUST TOLD US TO COME ON.

LT. R.L. HAMLIN: SO YALL WENT OVER THERE?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: BEN TOLD YALL TO COME ON?

MARK A. LILLY: YEAH. WE WAS DRUNK MAN.

INV. R.F. FLEET: WHAT HAPPENED TO THE DUDE THAT OWNED THE CAR?

MARK A. LILLY: BEN SHOT HIM.

LT. R.L. HAMLIN: NO . . .

INV. R.F. FLEET: NOT YET.

LT. R.L. HAMLIN: WE'RE TALKING ABOUT AT THE STORE. NOW.

MARK A. LILLY: OH.

LT. R.L. HAMLIN: AT THE STORE WHEN BEN TOLD YALL TO COME ON, WHAT, WHAT HAPPENED TO THE BOY YOU TOOK THE CAR? THAT WAS DRIVING THE CAR, WHAT HAPPENED TO HIM?

INV. R.F. FLEET: I KNOW IT'S TOUGH, WE'RE JUST TRYING TO FOLLOW WHAT HAPPENED AT EACH PLACE. AND WE KNOW WHAT HAPPENED TO THE BOY.

MARK A. LILLY: YEAH. YEAH, MAN, SOMETHING ELSE, TOO. I'M GOING TO BE GETTING ALL THESE CHARGES AND THAT'S MY BROTHER I'M TELLING ON.

INV. R.F. FLEET: I KNOW THAT.

LT. R.L. HAMLIN: YEP.

INV. R.F. FLEET: YOU DIDN'T PULL THE TRIGGER, THOUGH.

MARK A. LILLY: I DIDN'T.

INV. R.F. FLEET: YOU DON'T NEED TO TAKE THE WRAP.

LT. R.L. HAMLIN: THAT'S RIGHT.

MARK A. LILLY: I KNOW, THEY'RE GONNA SEND ME TO THE PENITENTIARY ANYWAY (INAUDIBLE) GRAND JURY (INAUDIBLE) THEY GOT ME FOR ARMED ROBBERY. I KNOW YALL ARE GONNA BRING UP SOME KIND OF MURDER CHARGE.

INV. R.F. FLEET: THAT'S WHY WE'RE TALKING TO YOU. WE'RE TRYING TO HELP YOU RIGHT NOW, TRYING TO GET, YOU KNOW, TO FIND OUT WHO SHOT THIS BOY. NOW WE KNOW THAT YALL WERE THERE AND BEN PULLED THE GUN ON THIS GUY. AND YALL GOT IN THE CAR AND WENT DOWN TOWARDS MCCOY.

LT. R.L. HAMLIN: DID YOU, WHO MADE THE BOY GET IN THE CAR? DID YOU DO IT?

MARK A. LILLY: NO.

INV. R.F. FLEET: WHO DID?

LT. R.L. HAMLIN: WHO PUT THE GUN ON THE BOY AND MADE HIM GET IN THE CAR?

INV. R.F. FLEET: TELL THE TRUTH, MARK, FOR GOODNESS SAKES. WE'RE THE ONLY PEOPLE THAT ARE GOING TO HEAR RIGHT NOW AND THE ONLY PEOPLE GOING TO DO ANYTHING TO HELP YOU, NOW TELL THE TRUTH.

MARK A. LILLY: IT WAS BEN.

LT. R.L. HAMLIN: WHAT DID BEN TELL HIM?

MARK A. LILLY: I DON'T REALLY KNOW.

INV. R.F. FLEET: WHAT KIND OF GUN DID BEN HAVE?

MARK A. LILLY: PISTOL.

LT. R.L. HAMLIN: POINTED THE PISTOL AT HIM? WHAT DID THEY, WHERE WERE THE RIFLE AND SHOTGUN AT THAT TIME?

MARK A. LILLY: I DON'T EVEN KNOW. I WASN'T WORRIED ABOUT NO GUN I WAS DRUNK, THE ONLY THING I KEEP UP WITH MAN IS THE BEER.

INV. R.F. FLEET: THAT'S A GOOD THING TO KEEP UP WITH.

MARK A. LILLY: I AIN'T TRYING TO BE SMART. I DRINK ALL THE TIME.

LT. R.L. HAMLIN: ALL RIGHT, SO YALL LEFT THE STORE. THEN . . .

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: BACK TOWARDS. . . . PRICE'S FORK?

MARK A. LILLY: I DON'T KNOW. LET ME ASK YALL A QUESTION, WHERE WAS THE BODY FOUND?

INV. R.F. FLEET: WHERE WAS WHAT?

MARK A. LILLY: THE BODY FOUND?

LT. R.L. HAMLIN: WE FOUND HIM IN WHITE-THORNE.

INV. R.F. FLEET: WHITETHORNE.

MARK A. LILLY: WHITETHORNE?

LT. R.L. HAMLIN: OUT PRICE'S FORK.

INV. R.F. FLEET: YOU KNOW WHERE THE BOAT LANDING IS AT WHITETHORNE?

MARK A. LILLY: I DON'T KNOW.

INV. R.F. FLEET: YOU KNOW WHERE THE RAIL-ROAD TRACKS: REMEMBER RAILROAD TRACKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: IS THAT WHERE YALL WENT? TOWARDS THE RAILROAD TRACKS?

MARK A. LILLY: BUDDY, I CAN'T EVEN THINK. I DON'T KNOW.

LT. R.L. HAMLIN: SO YALL, WHERE WAS THE GUY SEATED AT WHEN YOU LEFT?

MARK A. LILLY: IN THE BACK SEAT BESIDE THE WINDOW.

LT. R.L. HAMLIN: WHAT WAS HE SAYING?

MARK A. LILLY: NOTHING.

INV. R.F. FLEET: WAS HE SCARED?

MARK A. LILLY: HE DIDN'T REALLY ACT IT, YOU KNOW.

LT. R.L. HAMLIN: WERE YALL HAVING A CONVER-SATION, WAS BEN AND UH, MARK, NOT MARK, BEN AND GARY TALKING? WERE YOU TALKING?

MARK A. LILLY: NO, NOBODY TALKED.

LT. R.L. HAMLIN: NOBODY SAID A WORD? AND BEN DROVE THE CAR?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: OKAY, SO YOU END UP IN AN ISOLATED SPOT OUT IN THE COUNTY SOMEWHERE, THAT'S ALL YOU REMEMBER, RIGHT? YOU WITH ME? YES OR NO?

MARK A. LILLY: YES.

LT. R.L. HAMLIN: SO YOU GO TO AN ISOLATED SEC-TION OF THE COUNTY, WHAT DO YOU REMEMBER ABOUT THE ISOLATED SECTION THAT WE'RE TALK-ING ABOUT? WHEN YALL STOPPED WITH THE GUY?

MARK A. LILLY: BIG OLD TANKS.

LT. R.L. HAMLIN: BIG TANKS?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: WHAT ELSE DO YOU RECALL?

MARK A. LILLY: THAT'S ABOUT IT.

LT. R.L. HAMLIN: REAL DARK?

MARK A. LILLY: YEAH, IT WAS DARK.

LT. R.L. HAMLIN: YOU REMEMBER RAILROAD TRACKS, BRIDGES?

MARK A. LILLY: SOMETHING LIKE THAT.

LT. R.L. HAMLIN: OH, WELL, WE'RE TRYING TO HELP YOU, WE'RE NOT TRYING TO LEAD YOU INTO ANYTHING.

MARK A. LILLY: I WASN'T DRUNK ENOUGH, YOU KNOW, I KNOW THAT I DIDN'T PULL NO DAMN TRIGGER. (INAUDIBLE)

LT. R.L. HAMLIN: OKAY.

INV. R.F. FLEET: OKAY, THAT'S GOOD. THAT'S GOOD.

LT. R.L. HAMLIN: ALL RIGHT . . .

INV. R.F. FLEET: YOU REMEMBER RAILROAD TRACKS? YOU SAID THAT RINGS A BELL.

MARK A. LILLY: (INAUDIBLE)

LT. R.L. HAMLIN: YOU REMEMBER A PILE OF JUNK OR ANYTHING LIKE THAT, WHAT ELSE?

MARK A. LILLY: I WASN'T PAYING ATTENTION.

INV. R.F. FLEET: A FIELD? A BIG, OLE CORN FIELD, LIKE?

LT. R.L. HAMLIN: YEAH, A BID, OLE FIELD THERE BEHIND IT.

INV. R.F. FLEET: IT'S SORT OF ISOLATED, RIGHT? WASN'T ANYTHING REALLY AROUND? JUST LIKE A BIG GRAVEL LOT, WASN'T IT? IS THAT WHAT IT WAS? REMEMBER THAT?

LT. R.L. HAMLIN: DID YOU GET OUT OF THE CAR?

MARK A. LILLY: I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU NEVER DID GET OUT OF THE CAR?

INV. R.F. FLEET: WHERE WERE YOU SITTING?

MARK A. LILLY: I WAS SITTING IN THE PASSENGER. BEHIND THE PASSENGER SEAT. I NEVER GOT OUT OF THE CAR.

LT. R.L. HAMLIN: DID GARY GET OUT OF THE CAR?

MARK A. LILLY: NUH-HUH.

LT. R.L. HAMLIN: THE ONLY TWO PEOPLE THAT GOT OUT WAS BEN . . .

MARK A. LILLY: AND THE DUDE.

LT. R.L. HAMLIN: WHAT DID, HOW DID YALL GET HIM OUT? DID BEN JUST SAY COME ON, GET OUT?

MARK A. LILLY: YEAH, JUST LIKE THAT.

LT. R.L. HAMLIN: AND THE GUY GOT OUT.

MARK A. LILLY: YEAH.

INV. R.F. FLEET: AND THEN WHAT?

MARK A. LILLY: AND THAT;S WHEN BEN SHOT HIM.

LT. R.L. HAMLIN: WHAT KIND OF WEAPON DID BEN HAVE THEN?

MARK A. LILLY: THE PISTOL.

INV. R.F. FLEET: (INAUDIBLE) WHAT DO YOU MEAN?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: AND WHO HAD THE GUN?

MARK A. LILLY: BEN.

LT. R.L. HAMLIN: BEN?

INV. R.F. FLEET: AND WHAT KIND OF GUN WAS IT?

MARK A. LILLY: .3S.

INV. R.F. FLEET: AND WHERE WERE YOU SITTING AT, OR WHERE WERE YOU AT?

MARK A. LILLY: I WAS STILL IN THE CAR.

INV. R.F. FLEET: DID YOU SEE THE SHOT?

MARK A. LILLY: I SAW HIM FIRE.

INV. R.F. FLEET: DID YOU KNOW WHAT HAPPENED?

MARK A. LILLY: YEAH. I DIDN'T KNOW WHAT TO THINK, MAN.

LT. R.L. HAMLIN: WHEN, AT WHAT POINT DID YOU TAKE THE CLOTHES OFF OF THE GUY? DO YOU REMEMBER THAT?

MARK A. LILLY: I GUESS THEY TOOK THEM OFF WHEN THEY WAS OUTSIDE FUCKING AROUND.

LT. R.L. HAMLIN: BEN TELL HIM TO TAKE HIS CLOTHES OFF, YOU REMEMBER THAT?

MARK A. LILLY: I COULDN'T HEAR WHAT THEY WERE SAYING.

LT. R.L. HAMLIN: DID YOU SEE THE GUY TAKING HIS CLOTHES OFF THOUGH? DID YOU SEE ANYTHING?

MARK A. LILLY: I SEEN THE DUDE TAKING HIS SHIRT OFF, SHOES.

LT. R.L. HAMLIN: THE DUDE WAS TAKING HIS SHIRT AND PANTS AND STUFF OFF? AND WHAT WAS BEN SAYING?

MARK A. LILLY: I DON'T KNOW. YOU KNOW WE HAD THE MUSIC BLAIRING [SIC]. IT WAS PRETTY COLD OUTSIDE, THE WINDOWS WERE UP.

LT. R.L. HAMLIN: ALL RIGHT. DID BEN GET BACK IN THE CAR. WAS HE GOING TO DRIVE OFF AND LEAVE THE GUY THERE TO WALK AWAY? DID BEN TELL HIM THAT HE WAS GOING TO LEAVE HIM THERE OR DID THEY JUST STAY OUTSIDE THE WHOLE TIME AND THEN BANG, BANG? AND THAT WAS IT?

MARK A. LILLY: THAT'S PRETTY MUCH IT.

LT. R.L. HAMLIN: BEN NEVER GOT BACK IN THE CAR UNTIL AFTER THE SHOOTING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: HE DIDN'T GET IN THE CAR AND START TO DIVE OFF AND SAY 'OH, I FORGOT, HE

KNOWS ME NOW, HE'S SEEN ME' AND STOP THE CAR AND GOT OUT?

MARK A. LILLY: NO, MAN.

LT. R.L. HAMLIN: THE WHOLE TIME, WHEN BEN STOPPED THE CAR AND GOT THE GUY OUT, BEN NEVER GOT BACK IN THE CAR? HE SHOT HIM BEFORE HE GOT BACK IN WITH YOU, IS THAT CORRECT?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: OKAY. DID YALL LEAVE THERE PRETTY QUICK? DID YOU SPIN GRAVEL AND TAKE OFF?

MARK A. LILLY: WE LEFT TOWN PRETTY QUICK, YEAH.

LT. R.L. HAMLIN: HOW MANY TIMES DO YOU THINK HE SHOT HIM? COULD YOU HEAR SHOTS?

MARK A. LILLY: A COUPLE.

LT. R.L. HAMLIN: A COUPLE OF SHOTS.

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: THEN YALL LEFT MCCOY. WHICH WAY DID YOU GO THEN? YOU COME TO GILES.

MARK A. LILLY: WE WENT TO GILES, WE WAS GOING OUT SOME BACK ROAD.

LT. R.L. HAMLIN: OUT THE BACK ROAD?

MARK A. LILLY: YEAH, THROUGH THAT LONG, STRAIGHT STRETCH AROUND THE CURVE.

LT. R.L. HAMLIN: OKAY, NOW, AFTER SEEING SOMETHING LIKE THAT, YOU AND GARY, AFTER THIS HAPPENED, WHAT WAS SAID AFTER BEN GOT BACK IN THE CAR? WHAT DID YALL TALK ABOUT?

MARK A. LILLY: NOTHING, I COULDN'T FIGURE IT OUT. I LIKE TO SHIT IN MY PANTS.

LT. R.L. HAMLIN: YALL DIDN'T TALK ABOUT ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: DID BEN SAY ANYTHING ABOUT SHOOTING HIM? BEN SAY 'WELL, I CAPPED HIM'? DID HE SAY ANYTHING?

MARK A. LILLY: WE WAS ALL STUNNED.

LT. R.L. HAMLIN: BEN WASN'T STUNNED WAS HE?

MARK A. LILLY: I DON'T KNOW IF HE WAS OR NOT. HE DIDN'T SAY MUCH. I KNOW GARY WAS.

LT. R.L. HAMLIN: YEAH.

MARK A. LILLY: I KNOW HE AIN'T SEEN NOTHING LIKE AND I HADN'T EITHER.

LT. R.L. HAMLIN: YALL HAVE NEVER SEEN NOTHING LIKE THAT HAD YOU?

MARK A. LILLY: NO.

INV. R.F. FLEET: YALL DIDN'T TALK AND BEN DIDN'T SAY ANYTHING?

MARK A. LILLY: NO.

LT. R.L. HAMLIN: YOU BOUND TO HAVE TALKED ABOUT SOMETHING, MARK.

INV. R.F. FLEET: HE SHOT THIS GUY AND NEVER SAID A WORD?

MARK A. LILLY: NOT THAT I KNOW OF. MAINLY TALKED AMONG EACH OTHER.

LT. R.L. HAMLIN: BEN WAS DOING THE DRIVING STILL YET?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: (INAUDIBLE)

LT. R.L. HAMLIN: SO YOU COME TO GILES COUNTY. WHO COME UP WITH THE IDEA LET'S UH, WE KNOW YOU ROBBED A COUPLE OF STORES OVER HERE, RIGHT?

INV. R.F. FLEET: STUCK UP A COUPLE OF PLACES, REMEMBER THAT?

MARK A. LILLY: I WAS WITH THE PEOPLE THAT DID IT.

INV. R.F. FLEET: REMEMBER THAT?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: GARY AND BEN.

LT. R.L. HAMLIN: YEAH, OKAY. WHAT, WHEN WAS THAT DECISION MADE? WAS THAT MADE ON THE WAY TO GILES? LET'S GO OVER TO GILES? WERE YALL GOING TO ROB STORES AND LEAVE THIS AREA OR. . . . ?

MARK A. LILLY: I DON'T KNOW, MAN, IT JUST ALL HAPPENED, LIKE THAT, BAM, BAM. THE ROBBERY JUST HAPPENED LIKE THAT.

INV. R.F. FLEET: WHOSE IDEA WAS THAT?

LT. R.L. HAMLIN: YEAH, WHO COME UP WITH THAT?

MARK A. LILLY: I DON'T KNOW.

LT. R.L. HAMLIN: DID YALL NEED SOME MONEY?

MARK A. LILLY: WE WAS BROKE.

LT. R.L. HAMLIN: YOU WERE BROKE.

MARK A. LILLY: YEAH. (INAUDIBLE)

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OFF OF THE GUY THAT YOU LEFT OVER THERE IN MONTGOMERY? DID HE HAVE ANY MONEY ON HIM?

MARK A. LILLY: I DON'T KNOW THAT.

LT. R.L. HAMLIN: ALL YOU KNOW IS YOU TOOK THE CLOTHES. TAKE HIS WATCH OR ANYTHING?

MARK A. LILLY: I DON'T KNOW NOTHING ABOUT THAT SHIT, MAN. I STAYED IN THE CAR.

LT. R.L. HAMLIN: YOU DON'T KNOW. OKAY, SO YOU COME TO GILES AND THEN EVERYTHING JUST CLICKED AND A COUPLE OF PLACES OVER HERE.

MARK A. LILLY: YEAH, IT JUST ALL HAPPENED QUICK. THEY WAS DRUNKER THAN HELL, TOO.

LT. R.L. HAMLIN: SO, THEN THE NEXT THING YOU KNOW YOU'RE CAUGHT AND BROUGHT INTO THE SHERIFF'S OFFICE?

MARK A. LILLY: YEAH. I WAS WALKING UP 460. NEVER SEEN SO GODDAMN MANY LAW IN MY LIFE.

LT. R.L. HAMLIN: DID YOU GET ANY MONEY OUT OF THESE STORES YOU WERE ROBBING OVER HER [sic]?

MARK A. LILLY: A FEW DOLLARS. BOTH THEM MOTHER-FUCKERS ARE CRAZY.

LT. R.L. HAMLIN: WHO IS?

MARK A. LILLY: BEN AND GARY. ALREADY HAD ENOUGH CHARGES ON THEM AS IT WAS.

LT. R.L. HAMLIN: SO AFTER YOU ROBBED THIS SECOND PLACE THE NEXT THING YOU KNOW IS YOU WERE APPREHENDED BY GILES COUNTY, IS THAT RIGHT?

MARK A. LILLY: YEAH (INAUDIBLE)

LT. R.L. HAMLIN: YOU WERE DRUNK AND TRYING TO RUN AWAY AND THEY CAUGHT YOU, HUH?

MARK A. LILLY: THE DIDN'T CATCH ME RUNNING.

LT. R.L. HAMLIN: ANYTHING ELSE?

INV. R.F. FLEET: I WANT TO GO BACK, MARK. TO RIGHT AFTER THE SHOTS WERE FIRED. YOU WERE IN THE CAR, BEHIND THE PASSENGER SEAT. WHO WAS IN THE FRONT SEAT?

MARK A. LILLY: GARY.

INV. R.F. FLEET: YALL HEARD AND SAW A COUPLE OF SHOTS. MUSIC WAS PLAYING. BEN COMES AND GETS BACK IN THE CAR AND YALL TAKE OFF. GARY, UH, GARY DIDN'T SAY ANYTHING?

MARK A. LILLY: NO, ME AND GARY SAYS 'GODDAMN', MOTHER-FUCKER SHOT HIM.

LT. R.L. HAMLIN: SAID WHAT?

MARK A. LILLY: SAID 'GODDAMN.'

LT. R.L. HAMLIN: BOTH OF YOU DID?

MARK A. LILLY: YEAH.

LT. R.L. HAMLIN: AND THEN BEN JUMPS IN AND DOWN THE ROAD YOU TAKE OFF.

INV. R.F. FLEET: AND WHAT DID BEN SAY?

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE'? 'HE'S DEAD'?

MARK A. LILLY: (INAUDIBLE)

INV. R.F. FLEET: HE FELT LIKE HE WAS DEAD? (INAUDIBLE)

LT. R.L. HAMLIN: DID BEN SAY 'I SHOT THE DUDE AND I THINK HE'S DEAD'? YOU REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: YOU DO REMEMBER THAT?

MARK A. LILLY: YEAH.

INV. R.F. FLEET: ANYTHING ELSE?

LT. R.L. HAMLIN: OTHER THAN BEING SCARED AS HELL, HUH?

MARK A. LILLY: YEAH, THAT'S THE TRUTH, MAN.

LT. R.L. HAMLIN: I KNOW, I CAN TELL LOOKING AT YOU, YOU'RE SCARED TO DEATH.

MARK A. LILLY: SEE SOMEBODY BLOWN AWAY, GODDAMN.

INV. R.F. FLEET: I KNOW.

MARK A. LILLY: I AIN'T NO VIOLENT PERSON. I'VE NEVER BEEN ARRESTED FOR VIOLENT CRIMES, YOU KNOW.

INV. R.F. FLEET: ALL RIGHT, THAT'S THE END.

LT. R.L. HAMLIN: OKAY, THIS WILL BE THE END OF THE INTERVIEW, THE TIME IS 2:53 A.M.

END

Testimony of Ron Hamlim/Cross

* * *

[849] CROSS-EXAMINATION

BY MR. TUCK:

Q. Mr. Hamlin, I'm going to ask you some questions and if you don't know, please feel free to refresh your collection with the transcript. Do you remember asking, you or Investigator Fleet, about what or whose place it was over in Floyd that they broke into?

A. Yes.

Q. And do you recall what answer, looking at Page 3, top of Page 3, what Mark Lilly said?

A. Okay. Mark Lilly said, I don't know.

Q. Okay. Now, we're probably going to be going through this a lot, so you might want to go ahead and pull out your, your copy. We will be going over the next few pages. Do you recall during the whole period of the transcript, did he ever mention that he went over to Radford at any point in time?

A. Did who say that?

Q. Did, did Mark Lilly ever say, hey, we went, after we broke into Floyd we went over to Radford?

A. I don't recall that he did.

[850] Q. Do you need to review it again to see if he did? I, I didn't hear it, but I –

A. I don't recall that, Mr. Tuck.

Q. Now, did he indicate how the car broke down on Page 5, do you recall him asking what happened to the Cougar?

A. Yes.

Q. And what did he initially say?

A. Let's see. Where is that at?

Q. Bottom of page, I think this is five. My copies are a little bit faded, but –

A. All right. He said he broke down and the battery went dead, and, oh, yes, the fucking transmission went out.

Q. Okay. And I believe you asked him or if you recall, do you remember asking him where they were at when Ben Lilly pulled the gun out supposedly?

A. Yes, yes.

Q. And where did they indicate they were at, if you recall?

A. They indicated they were in the Hethwood [851] Section of Price's Fork Road at a convenience store.

Q. Okay. Did they indicate where in that vicinity? Were they in the car, or were they in the trees? Where did they, where did Mark Lilly indicate they were at when Ben Lilly allegedly pulled the gun?

A. I think Mark stated he was probably still in the car.

Q. And where did he indicate that Gary was, if you recall? And I'm referring to the bottom of Page 5, if that's helpful for you.

A. He said he was standing up beside the Cougar.

Q. He indicated, or do you recall asking him about where was the shotgun and the rifle and those items?

A. Yes.

Q. On Page 7. About half way down and going toward the bottom half. And do you recall what his answer was?

A. Let me find it.

Q. Maybe I can help you point this out.

[852] A. Where at? I keep missing it. I can't see it.

Q. That's all right.

A. All right. He pointed a pistol at him. Us see, what did I say, where was the rifle and the shotgun at the time? Lilly stated, I don't even know. I wasn't worrying about no gun. I was drunk. The only thing I could keep up with was the beer.

Q. Now, you had, you interviewed him after Gary Price, is that correct? Gary Price interviewed Mark Lilly first –

A. Yes, that's correct.

Q. Okay. And were you present during that questioning an well and when you came in do they have like a little mirror that you was behind or anything?

A. No. I wasn't present.

Q. Okay. Now, after the abduction takes place over in the Price's Fork area, do you recall asking Mr. Barker,

or Mr. Lilly, if you heard any conversations or talking in between from the Hethwood Express to the Whitethorne Landing?

[853] A. Yes, I recall asking him that.

Q. And looking towards, I believe it's Page 8, but again mine is a little bit faded, ah, did you indicate what his answer was? Do you recall?

A. I think he said that, ah, there wasn't any talking.

Q. Did he also indicate throughout this questioning that he never got out of the car and that he was in the back passenger seat belt the entire time, is that correct?

A. Yes.

Q. Did he ever indicate throughout any of these proceedings that he or Mark Lilly had asked the victim to hide his face or close his eyes or anything along those lines?

A. No, I don't recall Mark saying that.

Q. I believe you asked him whether Ben got back into the car at any point in time before the shooting took place, do you recall what his answer was?

A. He stated Ben never got back in the car once he had taken Mr. Defilippis out of the car.

[854] Q. Now, do you recall asking him and this is on Page 12, now, I believe later on he may or may not give you a different response, after, this is after the murder has taken place, I believe you asked him whether he talked about anything, in that correct?

A. Y'all didn't talk about anything?

Q. And what was Mr. Lilly's response, if you recall?

A. He said, stated, no.

Q. Then you were present throughout this, did you hear Investigator Fleet ask the exact same question at the bottom of Page 12 and Mark Lilly gave the exact same response, in that correct?

A. Let me find it. That's, that's correct, sir. Yes, sir.

Q. I believe he indicated that Ben drove away from the scene and that's Page 13, top of Page 13, is that correct?

A. Yes.

Q. All right. Do you recall asking, ah, Mr. Lilly if they needed any money and what was his response, [855] if you recall? At the bottom of Page 13 –

A. He stated they were broke.

Q. Do you recall asking him if he got any money out of these stores that were being robbed over there? Do you recall what his response that, and if the, I'm, I may have heard something else in the transcript. I'm not sure if –

MR. SCHWAB: Your Honor, may the record reflect that –

MR. TUCK: If the Court wants us to play it back –

MR. SCHWAB: That he couldn't have heard anything from the transcript. That if he heard something that it would come from the tape.

MR. TUCK: Your Honor, it's been a long afternoon.

THE COURT: I understand.

MR. TUCK: I, I, I can hold this up to my ear or –

THE COURT: Do you want to refer, do you want to refer to the tape?

* * *

[859] CLERK: Commonwealth Number, Exhibit Number Fifty (50) will be a lab analysis.

MR. SCHWAB: And the other item, Your Honor, is a Certificate of Analysis performed by Patricia Taylor, which I believe the Court had previously ruled could be admitted, but hasn't formally been admitted. It was filed on October the 7th, and by a faxed copy and we could do it as a A and B. We now have the original copy, so that –

MR. TUCK: The original would be a better, Your Honor, –

THE COURT: It would –

MR. TUCK: We have no objections to the original being submitted.

MR. SCHWAB: Your Honor, I believe it has also been stated and if the record could show that there has been a stipulation that the car in question was in the possession of Alexander D. Defilippis and was owned by a member of his family. That Benjamin Lilly has been

previously convicted of a crime under the laws of Virginia that is classified as a felony. With that, the [860] Commonwealth Rests.

THE COURT: All right, sir. Is that your understanding of the stipulation?

MR. TUCK: Yes, Your Honor, we do stipulate to both of those items.

THE COURT: All right, sir. Thank you. The stipulation is accepted, an well as the exhibits. All right, the Commonwealth has rested. Would the defense rather begin their call of witnesses now, or would this be an appropriate time to adjourn?

MR. TUCK: Your Honor, since I've released all of our witnesses, I don't believe that we could start.

THE COURT: Oh, we did. All right.

MR. TUCK: Right now. We went ahead and sent them all home.

MR. JENKINS: And, Your Honor, we must renew our motions at the end of the Commonwealth's case –

THE COURT: All right, sir. We will take up those in a moment.

MR. JENKINS: Okay. in the morning, Judge?

* * *

* * *

[900] wanted to know why the guns were in the living room because Warren is not supposed to be around guns and Warren told me to just calm down that they, that Mark was getting the guns and taking them to the car.

Q. All right. And did Mark grab up the guns and do that?

A. Ah, yes, he did.

Q. Okay. Now, when you came in, I believe, under direct testimony you indicated that Ben Lilly had a liquor bottle in his hand, is that correct?

A. Yes.

Q. During that period that you were there, did you ever see Ben Lilly with any of the guns?

A. No, Mark was the only one handling the guns.

Q. Mark was the only one handling the guns?

A. Uh-huh.

Q. Now, what else was occurring in, that evening? They've got some liquor in there. Is there anything else going on?

A. Yeah, after the guns were taken out, ah, [901] I had went back to the bedroom to, ah, get ready for work and, ah, when I come back out, ah, he had coins laying in the floor and, ah, –

Q. Who had coins laying in the floor?

A. Mark did.

Q. All right. And –

A. He was going through them, you know, observing, looking at them, ah, and that's when he, ah, I noticed he said, here's a money clip and he grabbed it up and stuck it in his pocket and said he wanted that for himself.

Q. Okay. What did, now, and I believe you indicated that he grabbed it up really quick?

A. Uh-huh.

Q. It was gold?

A. Uh-huh.

Q. Do you remember anything else about the money clip itself?

A. No, sir.

Q. Were these things and, now, you said the coins, were they in protectors and things like that?

[902] Were they, some of the coins in like I say a protector is a –

A. Oh, I know, ah, a piece of paper, –

Q. Yeah.

A. Well, it's not paper, but it's, well, it is part of its paper and part of it's like a plastic, yeah. Okay.

Q. Okay. Now, I know you only saw it briefly. Can you tell me, all right, and I want you to be honest with the jurors and the Court, can you tell whether this was the one that Mark Lilly had or not?

A. No, because he, he grabbed it so fast. There's no way.

Q. But it, what you recall was that it was gold?

A. Yeah.

Q. Okay. Now, after Mark grabbed it up and said this is mine, what else was, what else was done? Or if you recall, what were they doing specifically? Were they drinking?

A. Oh, yeah. They were taking turns passing

* * *

[932] Q. I'm going to show you Exhibit Number Two (2). Do you recall seeing that?

A. That's the vehicle.

Q. All right. Now, how long have you known Gary Barker?

A. Ah, I went to school with him for about three years.

Q. All right. Are you familiar with his general reputation in the community for being truthful or untruthful?

A. Yes, sir.

Q. And what is that general reputation in the community?

A. He would basically blame anybody else for something that he would do.

Q. Is it –

MR. SCHWAB: Your Honor, that's a non-responsive answer.

MR. TUCK: I don't believe that's a responsive to the question. If you can't –

THE COURT: That, that, excuse me.

[933] That is correct and the jury is instructed to completely and totally disregard that response.

MR. TUCK: All right.

Q. I want to ask you, now, you can either say his general reputation in the community is for being truthful or untruthful. Either one of those, those are your two choices as I understand the law to be. Which one of those choices would you choose in regard to Gary Barker's general reputation in the community?

A. Untruthful.

Q. All right. Do you know Ben Lilly?

A. No, sir.

Q. Have you ever met Ben Lilly?

A. No, sir.

Q. You do know Mark Lilly?

A. Yes, sir.

Q. All right. And how do you know Mark Lilly?

A. Huh, I used to work up at Dominion Skating Rink and he used to come up there.

Q. And so that's the only relationship you

* * *

[946] A. That'll be fine.

Q. I know you're a little bit nervous. Just take a deep breath and try to relax. Now, back in December of 1995, was Mark and Gary renting a room from you in a Merrimac Trailer Court? I think it's called Holly Court.

A. Yes, sir.

Q. And what lot number was that?

A. Thirty.

Q. And I'm going to draw your attention to December the 4th, the day before Alexander Defilippis is abducted. Do you, what were you doing that afternoon?

A. That afternoon, I was working on my truck.

Q. All right. And what, if anything, you were, do you recall happening as you were working on your truck?

A. Ah, just that Gary was helping me work on the truck for a little bit.

Q. Gary came by?

A. Uh-huh.

Q. All right. And when, when did Gary arrive

* * *

[950] Q. All right. And did there come a point in time when they brought something into the house?

A. There, yes, there was a point in time where something was brought in the house.

Q. And what was that?

A. There was, ah, three (3) guns brought in the house.

Q. All right. And who brought the three (3) guns in the house?

A. They were being carried by Gary and Mark.

Q. And was Ben Lilly carrying the guns into the house?

A. No.

Q. Now, was anything else brought into your house?

A. No, not that I know of.

Q. All right. Was there any liquor or alcohol brought into your house?

A. There was some, yes.

Q. How much?

A. Ah, a few fifths.

[951] Q. All right. You say a few fifths. Is that two, three, four?

A. About three or four.

Q. All right. Did they offer you any and, and who brought it in?

A. Ah, I'm not sure exactly who brought it in, but I was offered some.

Q. All right. And you drank some too?

A. Yes, sir.

Q. Did Ben Lilly drink some?

A. A little bit, but not much.

Q. All right. He had a little bit to drink, but not much. And what about the other two? What about Gary and Mark?

A. They drank a little bit too.

Q. All right. But not much?

A. Not much at all.

Q. Okay. So, they were drinking. Now, the guns that are, are there, did you see Ben Lilly pick up any of the weapons?

A. No, I did not.

* * *

[954] pistol. Does this look familiar?

A. Yes, it does.

Q. All right. And why does that look familiar?

A. Well, that gun was one of the guns that was brought in that evening.

Q. All right. And you indicated the guns came out one more time. What was done with the guns when they came out?

A. Well, ah, one of the guns was, ah, kind of pointed at, at me and, ah, I'm not sure if it was in a joking manner or, or what, but –

Q. Which one of the guns were pointed at you?

A. It was the, ah, it was the 30/30.

Q. 30/30 rifle?

A. Yes, sir.

Q. And who was pointing the gun at you?

A. Gary.

Q. Do you know whether it was loaded or not?

A. I have no idea.

Q. All right. So, he pointed it at you and [955] you said you didn't under-, know whether was, he was joking and you didn't know whether he was not joking?

A. Right.

Q. Well, what, what lead you to that conclusion?

A. Well, –

MR. SCHWAB: Objection, Your Honor. That answer calls for a conclusion.

MR. TUCK: What factors? He, he, he has a conclusion. He's –

THE COURT: I, I, I do sustain that, but go ahead and rephrase. I think you can get to it.

Q. What factors specifically, I'm talking about what factors specifically lead you to believe that you didn't know whether he was joking or not?

A. Well, we were drinking and, ah, you know, when, when a person is on alcohol, you know that they don't always do the things that they mean to do –

Q. All right.

A. And so that's why, what brought me to the assumption that, you know, he might have been joking and

* * *

[961] A. No, sir.

Q. And what are they saying, well, strike that question. Now, so they come up there and they're talking and what occurs after the conversations?

A. Ah, there was, ah, there was just a few words exchanged, ah, the neighbor we went to go visit got a little harsh and, ah, then after that, ah, I seen the, ah, Mark with the, with the gun, with the gun that you just showed me there.

Q. The pistol?

A. Yes, sir.

Q. Where did Mark have it on his person?

A. He had it in, in, ah, a sweater jacket with a pocket on it and a hood.

Q. And what was he doing with that weapon?

A. Well, I, I heard it, I heard it click back.

Q. And you say you heard it click back. What are you talking about?

A. The pistol.

Q. All right. You heard it click back again.

[962] You heard the pistol click back. Was there a portion of the pistol you heard click back?

A. Well, the hammer.

Q. All right. And what did you see?

A. Ah, I saw it brought out just, just a little bit, not much. You could barely even see it. It was just –

Q. And what did you do when you saw the gun coming out?

A. I looked at him.

Q. And is that it? You just looked at him?

A. I looked at him and kind of pointed my finger towards him.

Q. And why did you –

A. Then –

Q. Why did you do that?

A. Well, I had a feeling that the gun was going to be pulled.

Q. Let, whoa, whoa, whoa. You, you can't get into your feeling. I –

MR. SCHWAB: That's okay, Your Honor.

[963] Q. You saw it coming out?

A. Yes.

Q. And you pointed at him. I, I cut your answer off when you were asking, answering that question. You were pointing it, a, the finger –

A. Right.

Q. At Mark Lilly and you were getting, did you say something when you pointed the finger?

A. No, I didn't say anything.

Q. Okay. And what did he do when you pointed at him after he pulled the hammer back on the, the revolver?

A. He put the gun away.

Q. He slid, when he said put it back, where did he put it?

A. He, he, he slid it back in his pocket. He didn't have it all the way out. He just slid it back in his pocket.

Q. Now, you indicated, ah, that there was some, ah, like heated words, is that correct?

A. Yeah, ah, it, ah, the neighbor, the [964] neighbor that we went to go visit got a little harsh like I said.

Q. He got a little harsh?

A. She got a little harsh.

Q. She got a little harsh. She was angry?

A. Ah, no, she wasn't angry. She's just that way.

Q. Okay. I think we probably all know a few people and that's when Mark pulled out the revolver and pulled the hammer back?

A. Correct. He didn't pull it out all the way. He just slid it out a little bit.

Q. And, and pulled the hammer back on it?

A. Right.

Q. And they weren't drinking at that point in time?

A. No, sir.

Q. Okay. When, all right, he pulls the hammer back. What happens after that?

A. Well, ah, after he slid it back in his pocket and everything they got up and left.

* * *

Testimony of Alfred Fall/Cross

[973] other trailer?

A. Maybe about, I'd say about a couple hours, two hours.

Q. Could you tell if they had been drinking in that period of time?

A. Ah, I couldn't tell at that time either.

Q. And when you pointed at Mark, he slid it back in and then they all left?

A. Yes, sir.

Q. And that's the first time you'd been around Ben?

A. Uh-huh. That's correct.

Q. They didn't tell you they were leaving anything at the trailer?

A. No sir, they did not.

Q. In terms of old coins or anything?

A. I wasn't informed of that, any of that.

Q. And where, what were they renting exactly?

A. They were renting one bedroom.

Q. Okay. And it's two bedrooms?

A. It's a two, it was a two bedroom trailer,

* * *

Testimony of Howard Barnett/Direct

[990] A. But as he leaned on the bar, well, I watched, I was looking at him.

Q. And he looked at you right in the face?

A. Yes, sir, he did.

Q. And did he tell you –

A. He told me, he told me to not to look at him either.

Q. He told you not to look at him?

A. Yes, sir, he did.

Q. And did he have anything in his hand?

A. And at that time I was, at that time I was very shook up just to tell you the truth.

Q. I can imagine. Did he have anything in his hand?

A. Yes, sir, he did. That's what I said, he had a pistol in his hand pointed at me.

Q. Does this resemble or the pistol that he had in his hand?

A. Well, I'll have to say that at that time I was probably so scared that I thought it looked bigger, but it did look a little bit bigger, but, yes, it does

* * *

[1020] there was something in your mind? Was there a reason why you didn't want Michael to go?

A. Well, the remark that Gary had made, yes, sir.

Q. All right. And what was that remark specifically?

A. That he could kill his beat friend without regretting it.

Q. And that was the reason that you didn't want your son to go with them?

A. Yes, sir.

Q. All right. And this was approximately 1:30 the afternoon of December the 5th, is that correct?

A. Yes, sir.

Q. All right. Your Honor, that would be all the questions I have for this witness. We would offer it for the truth of her, why she did things. Not for the truth of the matter asserted, which was a different ground than we originally based it under. We would also raise it under the ability to be able to impeach for the reasons stated earlier. This is, would be her testimony

* * *

[1040] remind you once again that you're still under oath.

PATRICIA QUESENBERRY: Okay.

THE COURT: And you're being, being recalled to answer certain questions that Mr. Tuck may have or certain questions that Mr. Schwab may have.

MS. QUESENBERRY: Okay.

PATRICIA QUESENBERRY RECALLED

DIRECT EXAMINATION

BY MR. TUCK:

Q. - I know just a few minutes ago I asked you a question about, you indicated that you had said, you didn't want Gary Barker and Mark Lilly to stay at your home, is that correct?

A. Yes.

Q. And why is it that you didn't want them to stay at your home? What specifically?

A. Ah, because I had asked them a question, what would they do if the law would get after them, ah, because I knew that they were out doing things that they shouldn't be doing, and, ah, -

Q. Was that driving without a license?

[1041] A. Yes.

Q. None of them are licensed?

A. Yes. Yes, ah, and Gary jumps up off of the couch and he says that I'll take a gun and blow out the back window and then I'd shoot anyone that would try to take him.

Q. All right. Now, and that's one of the reasons that you went to Warren or that was the reason you didn't want them to stay there?

A. Yes.

Q. Thank you. No further questions.

THE COURT: Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Where was Ben when Gary said that?

A. He was sitting on the couch beside Warren.

Q. And did you say Gary jumped off the couch too?

A. I have, I had two couches in the room there, I'm sorry.

Q. Okay. Are they across from each other,

* * *

[1045] DIRECT EXAMINATION

BY MR. TUCK:

Q. Mr. Nolen, I'm going to draw your attention to December the 4th. Do you recall that? I believe you've already testified about that.

A. Yes, sir.

Q. And I'm going to draw your attention further, I believe you indicated on direct examination by Mr. Schwab that there was a reason why Ms. Quesenberry didn't want them to stay there and you asked them to leave, is that correct?

A. Yes, sir.

Q. And what was that reason?

A. Because a comment that Mr. Barker made.

Q. And what was that comment?

A. A comment about if they got stopped or anything he would shoot the back glass out, shoot a cop or anybody.

Q. Okay. And you asked them to leave after that point?

A. Well, she asked me to ask them to leave.

* * *

[1061] Q. Okay. I'm asking you what happened?

A. What happened.

Q. Just start from the beginning. Let's start off with what you saw happen and then I'll stop you if, if I have any questions. How's that?

A. Well, –

Q. Just go from the beginning and, and, you've got –

A. Word for word, I really don't know what was said.

Q. Well, I'm not asking you what –

A. Ah, but we know that a gun was pointed at Howard.

Q. All right.

A. He was told to get on the floor.

THE COURT: I think if she didn't hear any statements made, I think she needs to confine her testimony –

MR. TUCK: All right.

THE COURT: To what she herself observed.

* * *

[1087] and what did you see when you came into the store?

A. Okay. This was the first time.

Q. Okay.

A. I came into the store and do what I was, and got some things, which I do ever night mostly and put them in my car and, ah, –

Q. Okay. And after you put them in your car, were you outside when a, I believe it's a Dodge Aires pulled up? And I'm going to show you –

A. The, the one thing as I was going out the door, one of my clerks, clerks said there had been a robbery at Eggleston.

Q. Okay.

A. And I went on and put my, ah, I had –

Q. Okay.

A. I was coming through the door –

Q. Okay.

A. In to get the things and the clerk was coming out and she told me says there's a robbery at Eggleston –

Q. Okay.

[1088] A. And I just, I didn't, you know, like, you know, pay much attention. So, I came on in and got my what I do, put in my automobile and –

Q. All right. Then you were out and then I believe this car pulled up, is that correct?

A. Yes, sir, it was something, looked like that, yes, sir.

Q. Okay. Or something to that, a car, a vehicle looking like that? There were some individuals in the car, is that correct?

A. Yes, sir.

Q. Three?

A. Yes, sir.

Q. And did you see two or three of the individuals exit the vehicle or one of the individuals?

A. Well, it's, I think all three of them were out, or getting out and looking at this, ah, Chevrolet car.

Q. All right. Was that where you were at?

A. No, I was back down from it. Kindly in front of the store.

[1089] Q. All right. And then did there come a point and time when they got back into the car?

A. Well, I –

Q. Or did they, did they get in the car and leave or –

A. No, no, sir.

Q. Okay.

A. Two of them, two of them came, came by me and I was out there, I don't, ah, fooling around the Christmas trees.

Q. Okay. Because it was almost Christmas.

A. Then, I, I got to suspecting something so I got the license number.

Q. Okay. Now, where had the third one gone? You said the other two walked by you? Where was he? Did he –

A. He was in the automobile.

Q. He had gotten into the car?

A. He was in the automobile, yes, sir.

Q. And when you say automobile, not the Chevrolet, but the Dodge –

[1090] A. Yeah, the maroon looking car.

Q. Okay. And then I believe that you, the last thing you said that you saw the other two walking towards the store?

A. They passed right by me and they, one of them, they spoke to me, I can't remember what they said.

Q. Okay.

A. And, ah, –

Q. So, you, I believe you said you were messing with some Christmas trees?

A. Well, just fooling around, but I, you know, I was suspicious at that time.

Q. Okay. And then what did you do next?

A. Well, I just fooled around there and they went on in the store, and, ah, I don't know what happened, I kindly cautioned, all caution left me, and, ah, I just walked right in and walked right in on it.

Q. All right, but in on what? You said –

A. On the robbery.

Q. All right. And who was in there, do you know?

[1091] A. Ah, my clerk, Mona Hylton.

Q. Right.

A. Ah, a blonde headed guy.

Q. All right.

A. And another fellow.

Q. All right. Was this the other fellow that came into the store?

A. No, sir.

Q. Okay. So, there's two fellows in the store and what are they doing? Are they buying things?

A. No, sir. Ah, the blonde headed fellow has the gun on my clerk.

Q. Okay. Now, I'm going to show you a gun. Does this appear to be the gun that he had on your clerk?

A. Yes, sir, it looks like that.

Q. Okay. All right. So, he's got a gun on your clerk. What do you do, Mr. Williams?

A. I walk right toward him. I –

Q. And what does he do?

A. Well, I, I think I got, I'm not sure not, but I think I got a hold of his arm.

[1092] Q. Okay.

A. And I pushed him kindly back in a, the gun hit me in the stomach, you know, the barrel –

Q. Uh-huh.

A. And I don't know what happened. I just backed up.

Q. All right. Did he say anything to you at that point in time?

A. Yes, sir.

Q. What did he say to you?

A. He said, I'll blow your head off.

Q. Okay. And who was that that had the gun?

A. The blonde headed fellow.

Q. All right. Did he point the gun at you when he said that?

A. Yes, sir, he sure did.

Q. And what did he do after that? I mean –

A. I, I told the clerk, I said, give him the damn money, Mona.

Q. And then what did you do after that?

A. And the other, the other guy walked, got, [1093] grabbed the money, went back and took the money and Barker, the blonde headed fellow, held the gun on me and backed up till he got out the door.

Q. And then he ran away?

A. I suppose so. He –

Q. All right. Now, do you recall hearing any, you indicated that he poked the gun in your belly. Do you know, or did he just jab it at you to get you back or was it just part of the struggle?

A. Well, I was going forward to him, I think, as I, well as I remember.

Q. Okay. But you do recall him putting the gun up to your head and saying, I ought to blow your head off –

A. Yes, sir.

Q. Or I'll blow your head off?

A. Yes, sir.

Q. Okay. Now, after they left, did you go after them?

A. I waited a few minutes. I started out the door, it seemed like a few minutes, I, you know, was a

* * *

Testimony of Bill Williams/Redirect

[1103] sorry, I didn't, I thought Mr. Schwab –

MR. SCHWAB: I'm through. That's fine.

MR. TUCK: Okay.

REDIRECT EXAMINATION

BY MR. TUCK:

Q. Just one question. When, you indicated they went in the store there and they were in there a while. Was Mona Hylton laughing? At any point in time was she laughing?

A. No, sir.

Q. Okay.

A. Not during the robbery, no, sir.

Q. All right. Thank you.

THE COURT: All right. Mr. Williams, thank you for your testimony. Is he to be excused?

MR. TUCK: Yes, Your Honor. Please let him go back –

MR. SCHWAB: We have no further reason.

THE COURT: Mr. Williams, you are excused. Appreciate you being here. You may leave.

A. I can go home, right?

* * *

Testimony of Mona Hylton/Direct

[1113] key every way I could. Well, Bill come in about that time, and he said, what's wrong, Mona, and Barkley says, lay in the floor.

Q. Where was the gun when he –

A. On the counter.

Q. On the counter.

A. And Bill grabbed him and they went in a candy rack and, of course, he dropped the gun, but Barkley got it and he pointed the gun at Bill, he said, I'll shoot your damn head off.

Q. All right. Now, how far did, I believe you called him Barkley. Was he the short guy?

A. Yes.

Q. How far was the gun away from Bill?

A. You mean after he pointed it at his head?

Q. Yeah. Yes, ma'am.

A. It was right up to, almost at him.

Q. Almost at him. Ah, within two feet of him?

A. Well, about like this. Well, no, you come a little closer.

[1114] Q. Okay.

A. And it was up like this.

Q. Looked like that?

A. So, –

Q. And then, all right, go ahead. I'm sorry.

A. When I looked because I felt like he, he was going to get me and when I looked he had the gun right up and Bill and the hammer was back on it. He said to Mark Lilly, he said, get the money and run. So, he run.

Q. The hammer was cocked back on that pistol?

A. On the gun.

Q. On the gun.

A. Because I was standing right there looking right at him.

Q. And then what happened after that?

A. Well, after Mark grabbed the money and run why he run.

Q. Did you see the automobile that they came in leave the convenience store?

A. Yes, I did.

[1115] Q. Okay. And ma'am did it go towards Blacksburg or which way did it go?

A. Well, it went right there at the corner and made a right when I saw it.

Q. All right. That would mean it would go towards Blacksburg, then made a right, would that be correct?

A. Yeah, right there.

Q. It would go back towards the old bridge?

A. But I, see I can't see that far.

Q. Yeah.

A. I do know that it turned.

Q. You do know that it had turned?

A. Yes.

Q. Now, ma'am, just one more question, please. Did, while this robbery was going on or this entire transaction, did either you or Bill laugh during the time that it was going on?

A. Laugh?

Q. Yes, ma'am.

A. No, sir!

[1116] Q. That never happened?

A. No, sir.

Q. Okay.

A. No, sir.

MR. JENKINS: Thank you, Judge.

THE COURT: Thank you, Mr. Jenkins. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Ms. Hylton, the way you made your arms, did Mr. Williams sort of bear hug him?

A. Yes, you know how they –

Q. From the side or the back or –

A. Well, it was right at the side, right at the side.

Q. And then they went into the –

A. Candy rack.

Q. And the gun was still in the shorter, blonde headed person's hand?

A. Right.

Q. Did it go off then?

• • •

Testimony of Clarence Hutchinson/Direct

[1143] A. Ah, –

Q. As far as, ah, I'm not discussing any time that you have, may have spent together, but specifically as far as in, in the, did you know him socially or did you know him from work?

A. Socially.

Q. All right. And did you hear others discuss what his general reputation in the community was for being truthful or untruthful?

A. Yes.

Q. And I'm going to ask you, do you know what that reputation is?

A. Yes.

Q. And what is his reputation?

A. Untruthful.

Q. All right. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. How did, where did you know him at this

* * *

[1219] foreman, but the form book says that and it's on the computer. It's much easier than trying to figure out ahead of time who goes where. The top is to find him guilty. The bottom is you find him not guilty. There's one for each offense except for the ones concerning murder. The Judge has given you instructions as to capital murder, first degree murder and second degree murder. If you find him not guilty of capital murder, then you'll have to put not guilty on this one and continue to one of the others. If you find him not guilty of first degree, you write that on this and then you go to the second degree one. If you find him not guilty on second degree, you'll put that on the bottom. If for example you determine he's not guilty of capital murder, but guilty of first degree,

you would have whoever you select as your foreman or forewoman or foreperson to sign not guilty on the capital murder and then guilty on the first degree murder, if that's what you find, and then you won't have to worry about second degree murder, if you got that far. And the one I had on top was whether Ben Lilly is guilty or not guilty of [1220] possessing a firearm after having been convicted of a felony. We can take care of that one right now. You really don't have any choice. It's been stipulated he's a felon. The witnesses have testified he handled a gun. He stated on the tape he handled a gun and his attorneys have essentially said he handled a gun and that's minimum. I won't go into everything else that says he may have had a gun or he was in possession of a gun, but we know from Mr. Lucas, no one's disputed that, that he took the rifle and put it in the trunk. That was in Montgomery County. This one you fill out on the top line. The elements of the other offenses, what crimes were committed, we can start with carjacking. Now, forget what Ben Lilly said, forget what Gary Barker said and forget what Mark Lilly said, what do we know? Tom Staeger was with his friend. They pulled into the mini-mart there in Hethwood. Tom went in to make copies. Alex got out to look at his tire. He comes out, Alex is gone, his car is gone. Tom can't find him anywhere. He doesn't know where he went. He wasn't expecting him to go anywhere. Tom's book bag is in the car. They're going [1221] to the library. They're supposed to go back to the apartment and return the notes. He's gone. Well, that was about 7:00. Around 8:30 or so, that car, Alex's car, the one Alex was in with Tom and Tom's things that they were going to the library to study for is on the side of the road

in Giles County. Alex isn't anywhere around. One person is right there. Another one is later found near the cars identified as having been involved in a robbery and it has things in it that belonged for the robberies in Giles County. Where is Alex? Does it sound like somebody took Alex's car? Does it sound like they took it when Alex didn't want them to? Yes. And where is Alex? Nobody knows at that point. Does it sound like Alex was abducted? Does it sound like that he was taken by force? Or intimidation against his will and deprived of his liberty? It just sounds like that to begin with. His watch is in the back of the car in Giles. His wallet is found out in the ground. This we all know around 8:30, 9:00 that night. The wallet is found the next morning, but the watch was there. Where is Alex? They find Alex. Alex, as you saw in the pictures, is laying [1222] there in his socks and his underwear on a cold, December night, with four (4) bullet holes in him. Did somebody take Alex's car against his will? Did somebody take Alex against his will? Did somebody take his clothes and his possessions against his will? Did somebody deliberately shoot him? You saw he was hit three (3) times in the head. Was it willful? Was it deliberate? Yes. All you have to do is look at the picture. All you have to do is hear the doctor talk about where the bullets went. That was no accident. Did it happen during a robbery? The Judge instructed you that the killing occurs during a robbery when the killing and the taking of the property occurred so close in time and distance and causal relationship that it's all part of the same thing. It doesn't matter if the taking came first or the killing came first. If they're that close together, they're all right there together and it's by the same people, it was a killing

during the robbery. if you can look at the photographs and where the wounds were and have any doubt whether who did that, meant to do it, intended to do it, as the Court instructed you, had a specific intent to [1223] kill and there's a blood trail. So, Alex didn't go down to begin with and Dr. Oxley told you, that one that killed him would have caused instantaneous unconsciousness. He couldn't have been shot with a fatal shot to begin with. So, whoever kept pulling that trigger intended to kill Alex. That's willful, that's deliberate, that's premeditated and in every case there's a gun. There is no doubt whatsoever as to any of the elements of the offense. The only question you have in each one is whether it was the defendant who committed the crime. That's what this case is all about. You've been given all this evidence. It tracks across three (3) counties. It tracks across a little more than twenty-four (24) hours. It tracks across different places and different crimes, but it doesn't change the crimes. There is no question an to the crimes. As far as the Commonwealth would submit, you can throw second degree murder verdict form away. if you can look at those pictures and think that it wasn't premeditated, that it wasn't willful and it wasn't deliberate, then you haven't been here. if you can look at those and know that his

* * *

[1229] you don't know beyond a reasonable doubt that bullet came from that gun? No. It's not absolute proof. It's proof beyond a reasonable doubt and there's no other evidence to refute. Ben Lilly told the police, well, let's back up a second here. Gary Barker is the key to the case to a certain extent. Not the only key. He's not the only evidence. You've got to decide if Gary Barker is telling

the truth. About everything? No. They bring in two witnesses to show you his reputation for truth and honesty in the community. A thief and a rapist, who obviously doesn't like Gary and who by the way, said Gary always blames everything on everybody else. Wonder why Gary confessed to all those crimes in that case? You must not shift everything to everybody else, because he said he robbed, he said he broke in a house, he stole, he got in the car with them while they took it, he carried the gun into the two places in Giles. He shot the rifle out of the window, so he must not blame everything on everybody else. Then they bring in another burglar and thief to tell you that seven years ago when Gary would have been, I think I was wrong the other day, somewhere [1230] around 13 or 14, they talked about his truth and honesty in the community. We know he's not honest. He sat right there and told you he wasn't honest. He said he was a thief. He told you he did all these things that night. Of course, he's got a rotten reputation. Does that mean every word he says is a lie? No. Because Mr. Sanders told you all that stuff was stole at his house. The stuff that Gary Barker told the police where to find it under the couch at A. J.'s place, so was Gary lying? Gary Barker told the police where they would find Alex. Was he lying about that? They're going to tell you all about selected lying. And it's somewhat what I've told you about. Only they want you to take the little pieces and disregard everything. I want you to take the little pieces and sort through it. I want you to figure out who is telling the truth. Was it Ben Lilly who told Investigator Price he was eating a Granola Bar? He didn't never have a shotgun? Was it Officer Tilley who told you he had his gun out and said

three times, put it down, put it down, put it down and had no doubt that this shotgun sticking out the corner of that door was what Ben [1231] Lilly had in his hand? Doesn't look much like a Granola Bar, does it? Ben Lilly told you through his statement to the police, that they picked him up on that night on Price's Fork Road. He didn't know where they got the car. If you remember the testimony, and how you got to Whitethorne? We went down Prices Fork Road, then you turn. Then you went down the McCoy Road. Where was Alex when Ben got in the car? Where was he? Which one of the three you heard from that night never saw Alex? Which ones? Did Mark see him? Yes. Gary see him? Yes. Ben see him? No. What's that tell you? What does that tell you? For a few minutes that night while Ben sat in the car while the Giles County Police officers searched the woods for three people armed with assault rifles is what Ben told them to begin with. While they did that, while those officers didn't know what was going on where people were with other weapons, Ben had to sit in the back of that police car, and he had to sit there, and he had to sit there, and he knew he wasn't going anywhere and for a few minutes, Ben Lilly's humanity popped through. He got on the loud speaker and he called for his brother. [1232] He said, Mark, come on in, Mark. You're not the one who has done anything really wrong. Okay. You want to believe Ben Lilly then? Fine. So, that eliminates Mark. Then what else does Ben do? He asked the Chief of Police for Pearisburg, can you do me a special favor? Can you do me a special favor? Can you take that shotgun and stick it in my mouth and pull the trigger? For one moment Ben Lilly had remorse, and the officer as most people would be

says, what do I look like a murderer? And Ben says me. And he said what does a murderer look like? And the conversation goes along and he says me and then what does he talk about after that? I'm going to hell and meet my brother. Why on earth would Ben Lilly go to hell if he just got picked up by his brother and this other guy with nobody else in the car? All he did was buy beer at a couple of places and he was scared to death of those two, because he couldn't believe what they were going [sic]. Now, why would he go hell for that? He wouldn't go to hell for that. Ben Lilly knows why he's going to hell. Two people said Ben Lilly shot Alex Defilippis. Nobody, nobody and no evidence has said Ben [1233] didn't shoot him. They're going to tell you that Gary must be lying because he got fifty-three (53) years. Do you want to know what I think of Gary Barker? I think of fifty-three (53) years. That's what I think of. That's what he got. The minimum sentence he could have got. Why? Because at 9:47 on that night he started an interview with investigator Price and he told them everything. He told them that he was involved in a robbery there. That he had the gun. That he fired the shot out the back. Where did the car come from? We got that in Blacksburg. What happened to the gun? Investigator Price said he became very emotional and he told them Ben had taken a gun, the pistol, gone over and got the guy, they had driven out and then they had shot him. He drew them a map where to find the body and they found the body. So, between those two things, we know Gary Barker is telling the truth and Ben is lying. Ben wasn't even there. Ben must have driven right past Whitethorne when Ben was in the car. Now, what about Mark? What did you hear Mark tell the

police? It's hard man. He's my fucking brother. There is no evidence [1234] before you that says Ben Lilly didn't kill him and there is evidence before you that says Ben Lilly killed him. Took him out, took his car, drove him down, stripped him down on a cold night, let him start walking away, and then went over and fired, and fired and fired and left him there. And if that stuns you, who else did you see, hear it bothered? Who else told you, who else have you heard who said that killing like that stunned them, bothered them, never seen anything like it? Two (2), Gary Barker, and in his statement, Mark Lilly. Man, I'd never seen anybody blown away like that. It wasn't like shooting a deer. Ben Lilly wasn't even there though. That's the evidence, Ladies and Gentlemen, in a nut shell, and look at all the other pieces. There in no doubt these crimes are committed just the way they are. There was car jacking, there was abduction, there was robbery and there was murder while they were robbing him part of the same thing because they never even drove off Every crime is there. The only thing that your duty is is to decide whether to put his name where it says defendant on the instructions and I submit to you that [1235] there is plenty of evidence for you to do so, and they're going to tell you you can't believe the other two. Gary Barker said he pled guilty so one day he'll have a chance to get out. He pled guilty. So, Michael Lang may not be exactly right, but he shifts all the blame to the other, and he set here on the stand and told you he was guilty of these offenses. Now, you're going to hear how with Bill Williams, Gary didn't tell you he stuck the gun up to Mr. Williams. Gary didn't tell you, he said, I'll blow your fucking head off. Material facts, materials facts. What did

Gary tell you? What did Gary tell the police? He went in with a gun to a convenience store, he had a gun out, he was waving it around, they asked for money. Armed robbery. Mr. Williams says he comes in, he's got the gun out. Now Ms. Hylton said they got it, rested it on the counter. He comes in, he grabs him and he turns around and he points the gun at him, he said, I'll blow your head off. It's still armed robbery. It's still armed robbery? Sure it makes Gary look a lot better, but it doesn't change what he did. Does that mean Gary was lying about everything just because he left [1236] out the part where he put the gun? Because he stuck his head right in it. He is guilty of armed robbery. And if he stuck that gun out of the window and he shot back at Mr. Williams or he stuck it up in the air. It doesn't matter. He told you he fired the gun back there. it didn't hit Mr. Williams at either way. Material fact. on the material facts, you take all this evidence together. It is very little on material facts that you can believe that Ben Lilly told anyone except for what he said on the loud speaker and what he said to Mr. Chief Whitsett. Then Ben was back down there telling you how he was, he was trying to save Mrs. Barnett. You heard Mrs. Barnett. Was Ben down there trying to save her? Was Ben part of the robbery. Did Ben not know what was going on? What did Mr. Barnett say? They were going the wrong way. They were going towards McCoy. They must have gone around. They come down the road, they're lights are on, they turn off their lights. Then they turn to the darkest part of the road and then they still don't got out of the car. They wait till he walks across the street and goes in his store. Ben says, well, we [1237] were just stopping to buy some beer. Ben left money on

the counter, do you remember? Did you hear the Barnetts say they had any money left in the store after those three left? Ben Lilly is guilty of each and every offense because if Ben Lilly didn't pull that trigger, then who did? Who did? Who has anybody ever said from this witness stand pulled the trigger but Ben Lilly? Who? Where is the evidence? You've got evidence that Ben guilty, Lilly is guilty. You have to weight it and them come to a verdict. Thank you.

THE COURT: Thank you, Mr. Schwab. All right, gentlemen, the defense.

CLOSING ARGUMENT BY MR. JENKINS

May it please the Court, Ladies and Gentlemen of the jury, first of all, I would like to thank you too. As I told you in the very beginning, we were appointed, Chris Tuck and I, and I certainly want to thank Chris Tuck. I have been practicing as you probably surmised a little bit longer than him and he was a pleasant surprise in this case. He has worked hard on this case and we both have worked diligently. Now, if you want to accept [1238] the word of Gary Barker as the gospel, then we may as well go home, but that's not what the Court told you in these instructions and I will get with you in these instructions and I will tell you what and how I think that the instructions and the law and the facts ought to be applied. We are talking about when we speak of law of the Constitution of the United States, Constitution of Virginia and what the rules and the laws and the regulations in this country tell us that we must do, tell us what we have to believe, tell us about presumptions of innocence and they tell about what weight to give to accomplices. Now, as I

say, it's pretty hard to argue with somebody that says we admit that Gary Barker didn't tell the complete truth and I'll get into that later, but who are we talking about today? Of course, there's a young man dead. I'm very sorry for that, but we're talking about Ben Lilly over here. We're talking about this man right here (pointing to Benjamin Lilly). He's an American citizen who is just exactly the way you are, and the way anybody else is when he comes into this Court. What does Judge Grubb tell you about Mr. Lilly? [1239] He's presumed to be innocent and the burden still rest upon the Commonwealth to prove beyond a reasonable doubt that he committed these crimes. To start out with, I'd like to go into the reasonable doubt. I'd like to go into some of the evidence that you heard. I'd like to go into the fact that there's a blonde headed man at a telephone booth. That's the only person that anybody saw. They didn't see Ben Lilly there. They saw a blonde headed person in the telephone booth. This young man told the police when they got a hold of him that he was going down the Price's Fork Road and he didn't have any part of that. Mr. Schwab wants you to disbelieve that and believe everything that Gary Barker said. Let's go and let's talk about that for a while. You heard Gary Barker testify, you heard him tell you about the way the shots were fired. The way I took his testimony to be was that it was almost point blank. You heard Dr. Oxley say that there were no powder burns on the body. Usually as someone is shot at point blank, there are powder burns that are left. That was according to Dr. Oxley. Well, that may create a red light to you. You may say, well, [1240] I don't know. Shouldn't we take a look at this young man's testimony a little bit more. Could he

have, been exaggerating trying to save his own hide? Well, maybe he was, but, of course, what Mr. Schwab says is certainly logical at points. If you wanted to take anybody's testimony as far as logic is concerned, you could say, well, yeah, there's certain parts that put together and certain that don't, but let's go a little but [sic] further. Let's go down the road, if we can, of where that we're getting to people who are independent of the three. People who were not with the three. Let's go on down the road, if we can, from the murder scene and let's go up to the little store in Eggleston, Virginia. Now Mr. Schwab, says, well, of course, he may have lied a little bit about what happened to Gary Barker in that Eggleston Store. Maybe he didn't tell the complete truth when he was handling that gun, but I want you to ignore that. I don't think you can ignore that. That man was under oath. He swore that he would tell the truth like anybody else when he got before you and you can consider that. If he would lie about that, if he would try to make it [1241] smoother for himself, what would he do on a very, very, very important part of who pulled the trigger on that gun? Now, I leave that to you. I don't think Mr. Schwab is going to try to tell you that you should not disbelieve or you should not disbelieve the testimony of the store owners at the small Eggleston Store. They have no ax to grind with anybody and what did they tell you that Gary Barker had? He was holding the murder weapon when he came inside there. Look at the evidence in this case and how many times did Gary Barker have that pistol? How many times was he holding it up? How many times was he waving it around? How many times was he threatening to kill somebody with it? Let's go on down the road,

if we can. Let's go to the convenience store at Pembroke, if we may, and let's trace that pistol along. Amazing that he had that pistol, isn't it? Here we go into the Pembroke Store. According to the testimony, Ben Lilly is on the outside. Is in the automobile. The automobile engine is running and what did Gary Barker say? He said, sure, I went into that store. it was kind of a little laugh, the woman was laughing and –

[1242] MR. SCHWAB: objection, Your Honor, he is misstating the evidence.

THE COURT: I think there is a slight distinction in your argument between what I perceive the evidence to be. If you'll just think back for just a minute and you can repeat it.

MR. JENKINS: All right. Well, at any rate, when he went into that store, I recall the evidence of the lady that was in, that Gary Barker said the lady was laughing.

MR. SCHWAB: It was Mark.

THE COURT: It was.

MR JENKINS: Mark. Yeah. Said they were laughing. I leave that up to you. That lady stated that she was not laughing. She stated that that wasn't funny. That's another contradiction in all of their testimony. They go on down the road and what does Gary Barker do? Gary Barker is in the automobile. Ben Lilly is driving and where did they tell you that the gun went out? It went out on the right-hand side of the road, on the right-hand side of the automobile. They had a [1243] tracking dog. A tracking dog had the scent of the people that got out of that car. Where did the tracking dog go? The

testimony was that he went over to that gun. So, you see Gary Barker had that pistol and he had that pistol at all times. Now, doesn't that kind of create a red light for you? Don't that tell you, do you believe him? Do I believe him beyond a reasonable doubt? That's what you must believe beyond a reasonable doubt if you convict Ben Lilly of capital murder. You've got to believe him as the gospel. Does he have a motive to lie? Of course, he did. He was trying to save his ownself. What did he do? And isn't it strange that he put this rifle, no matter where he put it, he put it to his mouth, he put it to his head, he put it somewhere on him and he was trying to commit suicide. Why? If he had nothing to do with this, if he was along for the ride, if he didn't know anything at all about this murder, if he didn't participate on it as a principal in the first degree, why would he ever want to kill himself? You are to determine that. You are to determine if he was telling the truth and as I say, some of you I noticed picked up small things that [1244] Gary Barker was saying that was inconsistent with what the other witnesses would say and you may not believe some of the witnesses such as Mr. Nolen, the home that he was in. You may not believe the other witnesses, but certainly you can't disbelieve the independent witnesses. The witnesses that were along in the robberies of what occurred in there. Do you believe Gary Barker? No, I don't think that you believe him and if he would lie on something small, he would lie on something big and what does the Court now tell you about Gary Barker's testimony? Gary Barker without any question is a convicted felon. You don't got testimony about a person's reputation who is a convicted felon from a rabbi, from a priest or a Presbyterian preacher. You get

their reputation from people Just like them that have a bad reputation. People that's been convicted of things. People that hang around with them together like the people that came in here and testified that they had a bad reputation for telling the truth. This goes to the weight of their testimony. It's something that you may consider and it's something that the Court tells you that [1245] you should consider in the instructions which the Court has given you. Now, some of this perhaps is circumstantial evidence and some of it is directed, the Court tells you in determining the circumstantial evidence it must not only prove the circumstances relied on, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proven must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt however strong or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. Do you think that every reasonable hypothesis on the circumstantial evidence has been excluded except guilt? it wouldn't be fair to Ben Lilly if you believe that, that at this time. Because after all, he's still presumed to be innocent and this presumption is an abiding presumption. it goes with him from the very inception of this case and it even goes with you when he's, when you're deliberating back into the jury room. It in what we call an abiding [1246] presumption. And what else does the Courts tell you? It tells you about being the judges of the credibility of the witnesses. You can consider the demeanor on the witness stand and you can consider a number of things which are only commonsense. But

when it comes to conviction of felonies, the Court tells you that the conviction of a felony for anybody that testifies up here is one consideration for you to give as to their credibility. it doesn't make their testimony completely out of bounds, completely for you not to consider on the fact that they've been convicted of a felony, but it is one thing that you can consider. Now, another matter that you consider is the fact that if you have, and I started to say if you believe that Gary Barker is an accomplice, but he's admitted that he was an accomplice. There is not any doubt about that and I'd like to read that instruction to you. Now, Mr. Schwab, is going to tell you this instruction now, I, it's kind of, of I don't want you to really pay too much attention to that.

MR. SCHWAB: Objection, Your Honor. He doesn't know what I'm going to tell them. If he could [1247] stick to his argument and leave mine to me, I'd appreciate it.

THE COURT: But we need, we need to once again make that distinction that this is anticipated.

MR. JENKINS: Your Honor, this is argument –

THE COURT: It is argument, but I want to caution –

MR. JENKINS: And you've already told them about that.

THE COURT: And I want to caution you in the future, but go ahead. That's all right.

MR. JENKINS: And I'd like to read that instruction to you and this instruction is a part of what this Court gave you, not what I say about it, or not what Mr.

Schwab says about it. Let me read you this instruction. The Court instructs the jury that while you may find, base your verdict upor. the uncorroborated testimony of an accomplice, to-wit: Mr. Barker, such evidence is to be received with great caution. Now, I [1248] repeat that, with great caution. The Court further instructs the jury that the testimony of an accomplice must be received, let me repeat that, must be received with great care and caution and if you believe the testimony of an alleged accomplice was false and that he was induced to testify falsely, either by fear of punishment or a hope of reward, you must disregard that testimony in its entirety. Nevertheless, if you're satisfied from the evidence of the guilt of the defendant, beyond a reasonable doubt, you may convict on the uncorroborated testimony of a single accomplice. Now, as I said, when he came in here, Gary Barker, and he testified, Mr. Schwab has already admitted, there is some of his testimony that's a little bit shaky and he was talking about the gun part of where he put the gun on somebody or what happened after this and, now, that's a little bit shaky, but as I say, if he wasn't truthful about that, would he be truthful with something that was really material? If he would be truthful about something that Mr. Schwab says is immaterial, would he be truthful about something that was material, especially if he had [1249] an interest in it, especially if he was trying to make a deal with the Commonwealth, especially if he was going to come up here and try to get off as light as he possibly could and he did get off light as he possibly could. He had these charges reduced to where he'll –

MR. SCHWAB: Objection, Your Honor. They weren't reduced.

THE COURT: They, they were not. Mr. Schwab is correct.

MR. JENKINS: I'm sorry, not reduced, Your Honor, but got the smallest punishment that he possibly could. Excuse me, Judge, I'm sorry on that I got carried away a little bit.

THE COURT: Excuse me. The jury is instructed to disregard the phraseology of, Mr. Jenkins made –

MR. JENKINS: Yeah. Disregard that statement and I'm, I beg your pardon for ever telling it. I didn't mean reduce, but I mean he got this, all this reduced punishment. I beg your pardon again. I didn't mean to tell you that would not be correct. The [1250] testimony of the witness may be discredited or impeached by showing that the witness has been convicted of a felony. He's been convicted of a felony, so you have a felon, you have an accomplice and you have a person whose testimony has wavered between falsity and the truth on immaterial matters, I might say. I don't know you might argue it's a material matter, but I think it was a immaterial matter that he testified to. As I say, if he did that, I think that that he would not be truthful. Thank you, Your Honor.

THE COURT: Thank you, Mr. Jenkins. Mr. Tuck, do you wish to continue the defendant's argument?

MR. TUCK: Yes, I do, Your Honor.

CLOSING ARGUMENT BY MR. TUCK

Both Mr. Schwab and Mr. Jenkins thanked you both or they thanked you all. At the beginning of this, I asked each and everyone of you, I said, if you can't pay attention for some reason, let one of the bailiffs know and one of you did, said, Judge, we need to take a few more breaks and I appreciate that because this is an [1251] important trial. Now, let's talk about the evidence. When I, when I went through my opening, I said let's look at some of the witnesses that we've got. Let's talk about Danny Sanders starting off over in Floyd County. Now, in Mark Lilly's statement, he says he doesn't even know where they were at. Doesn't know. Now he thought it was somewhere over in Indian Valley or some place over there, but didn't know where it was at. Danny Sanders says Mark Lilly has been over to my house. Mark Lilly knew where some of these things were. Now, let's also look and, and, and Mr. Schwab in his argument, he pointed out Page 13, Mark Lilly said, it's hard. He's my fucking brother, but on Page 5 when asked what they got out of the house, we said, and who went in? Just Ben. The officer said, just Ben? Yeah, just Ben. Then the officer says, Gary wasn't with him? And he says, oh, yeah, we were all in on it. Page 5, no problems that say your brother was the only one going into the house. Page 13, it's hard, because it's my brother. Let's look at the next witness, and I, but let's, let's talk about some of the things. We know the guns were taken. Mark Lilly [1252] knows where they're at or at least Gary Barker does. Gary Barker knows about the guns hidden under the couch. Gary Barker knows about the safe behind the bar and knows about the bar and they're saying, well, we went up

there to get a drink with Danny. We went up there to go have a good time. Danny Sanders says they knew I worked out of town. Okay. Maybe that's not material. Maybe that, maybe the fact that they lied about that, that doesn't, that doesn't make any difference, but us look to the next witness, the next two witnesses. Those are over in Radford. Mark Lilly never mentions in either one of his statements, never mentions he goes over to Radford period. Gary Barker said, well, I didn't tell the police about going over to Radford because I didn't want to bring Warren Nolen down, you know, didn't want to get him in trouble, but he's a drug dealer, he's a drug dealer. He doesn't want to bring him down, but boy he's willing to bring him down when he get's up on the stand. Now, let's look at Patricia Quesenberry and Warren Nolen. Let's see what is, what in their testimony? We know that they came over and they're drinking. We know that Mark [1253] Lilly dumps the coins out and Mark Lilly grabs up what appears to be a gold money clip and Warren Nolen said it was some kind of coin in it. Where did we find it? Down on Whitethorne Landing. Mark Lilly says he never got out of the car. Now, continue on. What else did they tell you about them? Look, we didn't want, we didn't want, normally we would invite Ben to stay the night, but we didn't want to invite him to stay the night because the way they were acting. What were they saying? What was Gary saying? Well, hey, you know, none of them have licenses. If the police try to pull me over, I'm going to take a shot at them. I'll shoot somebody who tries to stop me period. Made them feel uncomfortable about the whole thing. Now, they may, Mr. Schwab may get up and argue and say, well, we know Warren Nolen had some

drug convictions, but he's getting two drug tests per month and we know that he's gotten his license back. He was an habitual offender and he's got a restricted license. We asked him about it Patricia Quesenberry, is she a convicted felon? No. You didn't hear any evidence of that. She'd done any drugs? No, no evidence of that. [1254] She says, what, what occurred? Well, they were sitting around and they were drinking. Gary Barker jumps up off of the couch. The next witness, A. J. Fall. I don't know Ben Lilly he tells you. Didn't know Ben Lilly until he was introduced to me that night. Gary and Mark introduced him. They were renting a room from him. Gary and Mark were renting a bedroom from A. J. Fall. A. J. says we were drinking that night. We were drinking throughout the entire night. They were giving me the liquor that was stolen from over in Floyd and we were drinking pretty hard. Sometimes, well, there for a while he was saying a little bit and, but he kept saying they drank a little bit more, a little more and a little bit more throughout the course of the evening. But one thing he said, now, he doesn't know Ben Lilly, but he says, Ben Lilly never touched those guns. He knows Gary Barker. He knows Mark Lilly. Ben Lilly didn't touch those guns. You, you listen to Gary Barker, oh, yeah, we, he was handling those guns. Boy, he was, he had those guns . So, we can't, I guess we can't believe A. J. Fall either. Let's continue on. We, A. J. says we're going through [1255] the course of the evening and get up the next morning and see them off and who takes out the guns? Was it Ben Lilly? No. Ben Lilly didn't touch the guns, carry them out. The next witness we hear from, Joyce Lang and Michael Lang. Joyce Lang says they came up to her house

and she says they came up in the car and that was the car that she identified. Michael Lang says, well, I think they walked up. I'm not sure. I think they came walking up on that date. Now, Gary Barker says Ben Lilly never left us. We never left him. We were all together at all times period. We never had an opportunity to go spend any of the Two Hundred ($200.00) Dollars that Warren Nolen had paid him. They were together and you heard Warren Nolen say, well, I was expecting him to come back the next day to do some work. That's one of the reasons we talked about letting him spend the night, but they said they were going to take him on home. Get over there and Joyce Lang says, hey, Mike, you're not going with them. You're not going with them. They look like, you know, you've been in enough trouble and what does Gary Barker say, hey, don't worry about it. I'd just soon [1256] kill my own beat friend. She says no way you're going with them. She made a very good decision. Michael Lang gets up and he says, yeah, I was in some classes with him. I was in special ed and nger [sic] control classes with him. He said that I knew him. But that, you know, that he'd always put the blame on him. Mr. Schwab has already referred to that, and Mr. Schwab says, well, he's taken the blame for this. He's taken the blame. Let's see. Is he taking the blame when he tells Mr. Barnett or told you, this is a question now, did he tell the police the truth or did he tell you the truth? When he told you, no, I, I didn't point it at Howard Barnett. Hey, I was waving the gun around, but I never pointed it at him. Was he lying to you, or to you when he got up and he, he said, no, I didn't put that gun to Bill Williams' head? No, I didn't do that. I, no, I, I, yeah, I took the oath, but, no, I didn't do

that. No, I, I didn't put the gun to his head and tell him I'd blow his damn head off. Let's look at our next witness. A. J. Fall again. A. J. says they showed him the dead goose and they, they're going up and he described a, a neighbor who is a little [1257] bit cankerous and that there became an argument between Gary and Mark and the neighbor and what do we see Mark Lilly doing? Pulling out the gun and pulling the hammer back. A. J. says, no, no, no, no. No actually he didn't say anything. He just pointed his finger like that (describing). That stopped him. They got in the car the last time, they left. What else do we know about A. J.? He said that that wasn't the shirt that he was wearing. That was not the shirt that Gary Barker was wearing when I saw him at the end of the day. He was wearing a T-shirt. Gary Barker says they never went back to the trailer again. Where's the T-shirt that Gary Barker was wearing? But where is the T-shirt. Next witness we've got according to Gary Barker, I guess Ron Lucas is another drug dealer because they were going over to trade the, the guns for drugs. Ron Lucas goes to, to the police at 7:00 the next morning to report what he saw. 7:00 the next morning. is that what drug dealers do? Get up at 7:00 in the morning and go? Use your commonsense. Is this what a drug dealer does? Goes up and says, hey, look, this is what happened. Mark Lilly, [1258] he came in, he wanted to sell me a gun. I said, Mark, is it hot? And he says, oh, it's a little bit warm. He says I'm not interested, put the gun away. What do we see? Gary Barker comes out pulling out a gun and what does Ben Lilly do? Ben Lilly grabs the gun away and puts it in the trunk and says, put the damn gun away. And we told you that Ben Lilly grabbed that gun

and he, he was in that car and, and he's guilty of possession of a firearm after being convicted of a felony. There is no doubt about that and Mr. Schwab got up and said you can fill out the top one, you can. You can put that one aside. Now, we get down to Whitethorne Landing. No other witnesses. We don't have any other witnesses. Mr. Schwab referred to it he wished he had a, a video tape and so, I, I don't wish we had a video camera down there. I wish we never heard of Whitethorne Landing. I wish we were never here. I wish Alexander Defilippis was in, going to school and going on with his, his life, but that, that's not what happened. But let's, let's talk about, first of all, Mark Lilly shouldn't have never got out of the car period. Never got out of the car. Ben [1259] Lilly gets in and out of the car. Let me, let me take a step back. I, I definitely forgot about Price's Fork. Gary Barker says the car breaks down and I had to remember, I asked him, I said, do you recall telling Officer Price that Ben Lilly was way down the road? And he said, and after I showed it to him he says, well, I must have said, but I don't recall it. Gary Price was the first one to interview him. Ben Lilly is way down the road. Now, and then he gets up and testifies he didn't know where we were going. Ditch these guns in the ditch. We're going to throw them in the ditch and Ben says he's going to get me a car or get us a car and he asks for Mark, for the gun, and he goes over and Alexander Defilippis throws a Twenty ($20.00) Dollar bill at him. We've heard from Alexander Defilippis' friend that he didn't carry more than Ten ($10. 00) at any point in time. That he just wasn't the type, that he didn't carry a lot of money, so and Alexander Defilippis according to Mark Lilly throws the money out and Ben 5 makes

him get in the car. He says, yeah, we were, it was dark. We made sure that, that we got in the car He [1260] didn't see our face. And y'all recall, I asked, I, I showed him that picture. I said, what are, what are these things around the, the Hethwood Express? Are these lights I see? I pointed them out to him. I said, it's well lit up there, isn't it? I said what's that? And he said, that's, that's a light. I said, what's that? He said that's a night light. I said, what are those? He said those are lights. What's that back there? It's a flood light, but, no, he didn't see our face. It was dark. He didn't see my face. It's important. Now, again, I asked him, I asked him, I said, did you tell Howard Barnett to hide his face, to cover his face? No, I didn't tell Howard Barnett that no, no, I didn't do that, no. Howard Barnett gets up and he says, yeah, he told me he had that gun and, and I, I'm not sure if that's the gun. I was pretty scared, but he told me to hide my face and you better believe I did it. I may have been a little bit slow of getting down on the floor, but he, I did exactly what he said. So, they get in the car. Gary Barker's story. Mark Lilly's first story. Mark Lilly says we were going across the parking lot and Ben [1261] pulled the gun. Not Ben got the gun from me, but Ben pulled the gun and robbed, got Alexander Defilippis. No mention of the Twenty ($20.00) Dollar bill. No mention of the wallet. No mention of any of those things. Second story. Me and Gary were back at the car when Ben Lilly did this. We were way back at the car and Ben Lilly did all this. So, we got story Number One (1), story Number Two (2) or story Number Three (3). You can pick according to that who is doing the robbery and when. You can decide. Are those consistent stories? Are those stories that you can believe

beyond a reasonable doubt? Now, next step. They start going down the road. Mark Lilly says we're not talking about anything. Well, no, nothing was really said. Gary Barker goes on to, in some conversations and says they were talking. Not a big significance. Maybe that's one of those immaterial facts that Mr. Schwab has been talking about. They get down to the Whitethorne Landing and they get down there and Gary Barker, I mean Gary Barker says, well, we got out of the car and Ben stripped him and I thought it was funny. Now, you heard me ask him the question. Let me get this [1262] right. Alexander Defilippis has been abducted, his car has been taken, he's been robbed according to their testimony, and he's been stripped down to his underwear and his socks, and he thought that was funny and he said, yeah. You heard his testimony. Do any of you think that's funny? Now, let's look, now, Mark Lilly says we never got out of the car. Gary Barker says, well, we let him go and at that point in time we got back in the car and he says Ben came up and you were, you were here all of you. I get real close to Gary Barker, I said at point blank range, right, this close? And he said if not closer. Closer than three (3) feet. What does Mark Lilly say? Mark Lilly says in his statements, the officer asked him, he says, well, how far away was Ben Lilly when he shot Alexander DeFilippis and he says from here to those dudes and Gary Barker, I mean, Gary Price says, is that ten or fifteen feet and he says, no, it's more like ten or fifteen yards. That's thirty to forty-five feet. Closer than three feet or, could you hold on to that for me for just a second, (using measuring tape) , twenty-five feet, immaterial fact. Doesn't really [1263] matter. Would you let that go (measuring tape). immaterial. You

heard Gary Barker say at point blank range. You heard Dr. Oxley say if it was within twenty four inches, you're going to have powder burns. After that, it's, it may or may not be. Point blank range. Gary Barker says, well, we got in the car and Ben says, you, and I, I watched every single one of you and when he testified to this and it, it shocks me. He said that Ben said, give me a fucking beer, and everyone of you, I, just went back for a second. We've been talking about liquor and drinking liquor. First mention of beer. When did they get beer? When Ben goes to buy it in McCoy. Is there any evidence before you before then that they had anything other than liquor? Now, Mark Lilly says Ben didn't say anything. As a matter of fact I asked him, what did Ben say? What did Ben say? They asked him three or four times and finally Mark Lilly at the end of his second statement to Officer Hamlin, he says, I think he said, the guy was dead and he uses some explanation words and I don't see the need to use it at this point in time and Gary Barker says, said that, and he said, oh, he [1264] said the reason he had seen my face, he'd seen my face and that he didn't want to go back to the pen and that's why I did it. Mark Lilly says he didn't really talk about anything. Nothing. Nothing significant. I'm, I'm sure everyone of you remembered, give me a fucking beer. Mark Lilly can't remember that. So, they go to McCoy. Ben is the only one that goes in and who, who goes in and there they go, they go in there, does Ben have a gun? Does Ben rob any place? Ben's buying the beer and buying a case of beer. Go back and they get in the car. At that point in time, we know Ben's with them. There is no doubt about that. They got back into the car then they head over to Eggleston and

they drive around those roads and they come up on Howard and Louise Barnett and we've already touched on it. Now, you heard that Ben Lilly took the knife and I told you in the opening that Ben Lilly took the knife out of his hands and he threw it nine feet forward in the air, nine, ten to twelve feet forward in, into that little, little grocery store, but he had gotten Mrs. Barnett back away from where Gary Barker was. You heard Mrs. Barnett say that he went back [1265] to the beer coolers and they got the beer out and they took the beer to the front, front cashier. You heard Gary Barker tell you that Mark Lilly cleaned out the cash register. Louise Barnett couldn't tell you and Howard Barnett couldn't tell you either because he, he had his face down which nobody can blame him for. Mark Lilly is going to tell you that Ben Lilly gave him the cash. Ben Lilly gave him the money at, from the back. Gary Barker says, well, we got it and we divided it up, but who has the food stamps in their possession? Whose got the food stamps? We know those come from the robbery without a doubt. And whose got them? Gary Barker. Now, we get to the next store. What have we got? We go to the Pembroke store. There's a big plate glass window. They go into the store, they're robbed. Gary Barker looked at you and he didn't tell, he didn't mention to the police that he had told this man that he'd pull, blow his fucking head off and according to Mona Hylton, he pulled the hammer back. Mr. Schwab said, well, he didn't fire the gun in the store, did he? No, that was the response of all the witnesses, no, Gary Barker didn't fire the gun. It took [1266] three (3) shots to kill Alexander Defilippis. You notice whose only got two (2) shots left. Every place that they stop at has got two (2) people. Now,

let's talk about Gary Barker a little bit more and you've heard Mr. Jenkins talk about it and all of y'all saw Gary Barker testify. First, he denied he was a convicted felon. It turned out he'd been convicted of ten (10). It turned out –

MR. SCHWAB: Objection, Your Honor. It was a misdemeanor offense.

THE COURT: That –

MR. TUCK: No, I, Your Honor, I asked him –

MR. SCHWAB: It was a misdemeanor offense, Your Honor.

MR. TUCK: Your Honor, if I recall the evidence, I asked him how many felonies have you been convicted of and he said none. And I said, none. And I said what about the eight (8) that you have been convicted of regarding these charges? And he said, oh, yeah, those. And that was as I recall the testimony. [1267] Now, I may be mistaken. Now, he also denied being convicted of a misdemeanor, which the Court put in, I mean the defense put into the record, but I did, do recall asking that question and I would like to be able to argue that point.

THE COURT: All right.

MR. SCHWAB: I'll withdraw my objection.

THE COURT: All right, sir. Go ahead.

MR. TUCK: And we're going through and we're sitting there and each one of you, you, each one of you saw Gary Barker testify, and at first, he denied that he'd been convicted of any felonies. And I said what about these eight (8)? And he says, oh, yeah. And I said

what about the two (2) that you went to Court for this morning. He said, oh, yeah, those two (2). Was he lying to the police or was he lying to you? Was he lying to you under oath? Now, Gary Barker mentions that we made real certain that Alexander Defilippis didn't see our face, me and Mark. We made certain of that. We had him cover his eyes and you've heard Gary Barker say that he could see what was taking place when Ben Lilly shot [1268] him. You heard that. And he wants you to believe that, no, he couldn't see my face on that moonlit night, with the fog lights on that I could see that far down the road. He doesn't, he, oh, no, he couldn't see our face. No, it wasn't important. No, I didn't say that to Howard Barnett. It's for you to believe or not believe. That's the decision that you've got to, that you're going to have to make. Now, I'm not saying that your job is easy and I, I wouldn't want to be in your shoes, but when you go, go back there, you're going to have to follow those instructions and you're going to have to wade through the evidence and now one of the other things that may come up is, well, how did Ben Lilly got the knife that came from Floyd County? How did he get this money clip? How did he get some of those coins? I don't know, but he had Two Hundred ($200.00) Dollars when Warren Nolen met with him. He's got Ninety-five (95) when he gets stopped and Howard and Louise Barnett lost Four Hundred and Twenty-five ($425.00) Dollars. When they all three (3) are stopped, I believe Mark Lilly was, the inventory said he had a Hundred and Twenty-nine (129) and some food stamps, Gary [1269] Barker had Ninety-seven (97) and Ben Lilly had Ninety-five (95). Mark and Gary said we divided it evenly. That doesn't exactly sound

even. It would be fairly close between Mark and Ben I can see, but not between, excuse me, fairly close between Gary and Ben I could concede, but not with Mark. They were riding around all day. They didn't, Gary Barker didn't say they ate anything. Commonsense. The Judge is going to tell you, use your commonsense. Do you think they eat some place? And now Mark Lilly says one time, hey, I wouldn't do something like that. I wouldn't take a twelve (12) pack of beer. I had money in my wallet. The next time he says, we were broke. It depends on whether you want to believe him or not, but we know according to Warren Nolen that he had just paid Ben Lilly Two Hundred ($200.00) Dollars, and the last point I want to talk to you about is, well, the last few points, looking at, we know and Doug Maynard said in, in and you've got a certificate as one evidence that they tested this firearm for fingerprints and they tested it for ballistics, as well, and that this was worked up before he had an opportunity [1270] to see it in November and you're going to hear that there were no fingerprints on the gun. You also heard evidence that Gary Barker had gloves on. You also heard evidence that where the blue sweatshirt that Mark was described with carrying that, that Alfred Falls told you about that he was, that he had. You are going to hear that there were a pair of gloves found there, but when Ben Lilly's taken in, the only gloves that are around them are the gloves that were, come from the store and there's not a half eaten Granola Bar, there's a half eaten Beef Jerky. Now, going back to that car scene, we know that Ben Lilly told them that he was a secret agent or an agent for Montgomery County Sheriff's Department. And, obviously, that was not the truth and he did say that there

were people up in the woods with assault rifles and that wasn't the truth. And I ask you to use your commonsense and those are the type things that, that a drunk would say. Are those the type of things that someone sober would say? I'm a secret or I'm an agent with the Montgomery Sheriff's Department. Now, you also heard Bill Whitsett say and you heard him testify, I know what [1271] I heard and I, that's it. I, I guarantee I know and I heard him say me. Then on cross-examining, you heard him say, well, that, I think I heard him say me in December. In February, he said he wanted to confirm it and that's why he went back to ask him the question, but now it's definite without a doubt and you also saw me ask him if he remembered giving a statement to Gary Price and he says, well, I may or I may not have, and then he said, well, it's got the exact, it's the same content. Maybe not the exact same words, but it's the same content. Is, do you believe that beyond a reasonable doubt? And what is reasonable doubt? I asked many of you during the voir dire process, Mr. Jenkins and I, we switched back and forth and is it, is it probable cause, which is the lowest evidentiary standard we have, or is it preponderance of the evidence, more likely than not, or is it clear and convincing evidence, or is it beyond a reasonable doubt? A reasonable doubt. Now, those are the things that you're going to have to do and you've got a tough job and I'm not envious of your position in any way, shape or form. I leave you with this. Mr. Schwab, [1272] gets the last word because the Commonwealth has the burden. When he starts raising arguments, I want you to ask yourself. What would Mr. Jenkins say to that argument? What would Mr.

Tuck? What piece of evidence would he point to? Thank you.

THE COURT: Thank you, Mr. Tuck.

CLOSING STATEMENT BY MR. SCHWAB

Actually, Ladies and Gentlemen, I prefer that you ask yourself. Not what Mr. Jenkins would say. Not what Mr. Tuck would say, but what the evidence says. You don't have to believe me. You don't have to take my word for it. You take your word for it. You don't take what Mr. Jenkins might tell you or what Mr. Tuck might tell you. Take what the evidence is. Now, let's talk about what they've told you. You've listened to them. What are you supposed to believe? Who can we believe? Were Mark Lilly and Gary Barker not even there? Did they not rob the places in Giles? Did they not have the guns? Did they not break in in Floyd? Well, they have been lying about everything. How can they be telling the truth about that? No, you've got to go back to what we

* * *

[1275] from the wrong direction where they came from, when they turn off their lights in the street, when they pull into the darkest part, and Ben, he was just going in to buy beer. Do you believe that? Do you believe Mr. Tuck is the only one in this Courtroom that doesn't know how Ben got the things from Floyd? You know exactly how he got them from Floyd. And you know exactly what he did in Mrs. Barnett's store. You're going to have to sort through all of this. And, I'm sorry. It's difficult. And you're going to have to sort through every piece, but you can't take, if, if Gary Barker's a liar that can't be believed,

then he didn't have anything to do with this. And if Mark Lilly is a liar who can't be believed, he didn't have anything to do with this. You can't do that. He's dead. Alexander is dead. Somebody had something to do with it. And they want, well, who did it? How did it get done? if they're such liars that you can't believe anything, then this is all an illusion. You've got a job. You've got to resolve the convicts [sic] in the evidence. You're going to have to sit down there and put those pieces together. There are very few people that told you [1276] the absolute, absolute truth about any set of events because of the problems you have with the gun and everything else. And there is some that are going to lie to you and there's some going to leave parts out, but there's truth in here some place. They talked about uncorroborated accomplice testimony. Uncorroborated. Let's see. We were in Ben's old car and it broke down and then the place was right over there and we went and got it. Well, Ben's old car is there. We fired the shotgun that day. We fired the deer rifle that day and we fired the pistol that day. There were five rounds in the pistol. Mr. Lucas can tell you that. We went to Whitethorne. That's where you'll find his body. That's where you'll find his body. That part's corroborated. Who was the only person that tells them where to go find the things that they'd thrown away? Everything that they'd touched. Remember they stopped and they threw the stuff out of the car. They threw his clothes out. They threw Tom's book bag out in the river. They wiped all the stuff down. They broke out the speedometer part. Now, why on earth would he do that? Did Ben forget that? [1277] Where was Ben while all of this was going on? Where was he? That was after Price's Fork.

That was after they bought beer. Ben forget that? This missing T-shirt suddenly. Now, did Gary change when he killed him or did he change when he threw it in the river or did Ben not notice it? Where was Ben during all this? Poor old Ben. You know what this case is, Ladies and Gentlemen? You ever see those nature shows where you've got a big dog and the two young adults or a big wolf and the two young ones and they're going around and the big dog, the big dog is confident, you know. The big dog knows what's going on. He doesn't have to show off. Those two young pups though, whoa, they're jumping up and down. If they're in the neighborhood, they're knocking on the trash cans, and barking at everybody. They're strutting their stuff. What are the two young ones doing and this one during the whole time? Running their mouth, showing off the guns and everything else. Ben is old Mr. Calm. Ben doesn't have to prove anything? Ben's been to the end. You've got the big dog and the two young ones that are running their mouths and what it came down to, and [1278] you heard them both say, they'd never seen nothing like that before. The two young puppies. It didn't bother big dog though, did it? The big dog didn't even know anybody had been killed. The pistol. Mark, I think Mr. Jenkins left out all the times that Mark had the pistol. So, if Mark had the pistol and Gary had the pistol, nobody saw Ben have the pistol, but could have Ben had the pistol? Yes. And if Gary ran with the rifle at the end and the pistol was dropped, well, maybe that was Mark. Does that mean Ben didn't shoot? No. It doesn't mean that at all. That means there's no corroboration as to who had the pistol at the time Alex was shot. That's what that means. Gary Barker started

talking to the police at 9:47. Then he talked to the Blacksburg Police and then he talked to the Montgomery County Police and then he talked to the Floyd County Sheriff's office. You want to talk about fifty-three (53) years? Yes, ma'am and gentlemen, it is the minimum he could have got if he went to trial. Fifty-three (53) years. Boy, did he get off light. Fifty-three (53) years. 1943. That's what fifty-three (53) years is. Fifty-three (53) years ago [1279] was 1943. Fifty-three (53) years from now is the year 2049, so he got one heck of a bargain, didn't he, and he's right where he ought to be. Gary Barker was in this up to his neck. Mark Lilly was in this up to his neck, but only one person pulled that trigger. They talked about Gary wanted to commit suicide and why would he do that? He told you why. He told you why he didn't do it. Because he knew if he did it they'd all blame him. They didn't talk to you about why Ben didn't commit suicide –

MR. TUCK: Your Honor, I object to him pointing the gun at me. I mean that is improper.

MR. JENKINS: Me too, Judge.

THE COURT: Just a minute. Just a minute.

MR. SCHWAB: I'll move it to the other hand, Judge, it was a pointing, it wasn't to point the weapon.

THE COURT: All right. I can only hear one person at a time.

MR. TUCK: Your Honor, I object to having a firearm pointed at me in this, in this type of

* * *

[1281] hell anyway. Now, Warren Nolen and we talked about that. Well, now, you can believe Gary or not no matter what they did in Radford, I mean they were asking him about where the car came from. We broke in a house in Floyd, yeah, we're in Radford. And you can believe or not believe any of that. It really doesn't have anything to do with the case and a little interesting side light is that the offenses Mr. Nolen had been convicted of are possessing stolen goods and distributing drugs. Distributing drugs are not the same as using drugs. Corroborated. Is the testimony of Gary Barker corroborated? And in many, many respects it is. So, in those parts you can know you can believe him. There are hard parts of that part where you don't have the corroboration where there's only three of them. You remember and you have a copy of the Plea Agreement, the commonwealth said we'd give him fifty-three (53) years if he would testify truthfully, and if after he pled guilty, he'd under oath indicate whether or not the statements he had given the police were true. in other words, Gary Barker could have got up here after he pled guilty and [1282] said, I lied, I did it. I lied, Mark did it, and there was nothing we could have done. It's in there and it's in there that way for a reason. He could have said whatever he wanted after he pled guilty. He still had fifty-three (53) years, he still agreed to truthfully, testify truthfully and I might have been left with egg on my face, but he was going to testify truthfully the best I could prepare and if that was not having testified, because he said, no, I was the one that did it. Mark, yeah, they were all in on it. They were all in it, on it anyway. They were all down there. They can say they got in the car. Didn't get out of the car. They were all

in it. We know that. Floyd. What difference does it make if Mark knew the guy or didn't know the guy? The house was broken into and the stuff was stolen and Mark said that. Gary said that. Does it make any difference in when you're looking for the kernel of truth whether or not Mark admitted he knew the guy whose house they broke in? What difference does it make? His stuff is still right here. It's still gone from his house. Does it make Mark less guilty or more guilty? Or just that you [1283] can't believe everything he says? So you're going to have to look at it. We know he was shot from a distance of more than twenty-five (25) feet. The tape measure was very nice, but you remember on the tape what you heard? How far away were they Investigator Price? As far as those people, from me to you. Investigator Price, ten to fifteen feet. Mark goes, no, ten or fifteen yards. Well, those people were no farther away when Investigator Price asked him then when he answered, so maybe Mark's not real good with distances. And you know what, how close you got to be? How close do you have to be? You saw the blood trail. Here (pointing). The paint starts there and it goes over to there (pointing), so they could have been at different distances and where was he hit? Right to left, through the lip. Left to right, through the back of the neck, and then right here (pointing). Could there have been different distances and if he was close enough to hit him with the gun, with the bullets, what difference does it make if it was four feet, or twenty-five feet or fifty feet? It was close. It had to be close. It had to be close to hit him that many times [1284] in the head over that short a distance and the fact of the matter is, he was shot whether Mark says it was thirty

feet or fifteen feet or fifteen yards or Gary says it was point blank or a little ways away or whatever. He's dead. He was shot. Is he not shot because Mark said fifteen yards? No. Is he not dead because Gary said they were up close? Well, that, you know, if he said he was up close, then I don't guess he's dead, right? What are you going to believe? Yeah, Ben said, give me a fucking beer. And what's the first thing they did. They all three agree on that. They went down the road, you heard the deputy talk about the distance. It was about five minutes at the most from Whitethorne to that little store and what's the first thing they did? Take that money they had and go in and buy a case of beer and cigarettes. Big dog needed a beer. It made him thirsty. Didn't have to rob them because they hadn't figured out they had, needed to dump everything and take off to West Virginia. Even Ben said they were going to West Virginia. Remember? That's why he wanted to get some more beer, so he wouldn't have to keep stopping and I'm [1285] still trying to figure out what Ben did with that money he left for the Barnetts. Remember? Oh, I dropped some money on the counter. So, what do you think Mr. Jenkins and Mr. Tuck would say about Mrs. Barnett's testimony? It still comes down to who you believe and what you believe. Yes, two of them had gloves, and Ben didn't have on glove. They also stopped and threw all the stuff out. Now, we knew they threw the things out. They even threw out a sun visor and the part that goes over the speedometer, so maybe the reason they did that was because they were afraid they may have left fingerprints on it. So, maybe they wiped the gun. Or maybe because the people who had it after that had gloves on, so that would have wiped it off.

Or maybe as Mr. Maynard indicated, you don't always find prints. Well, let's talk about something else to do with their hands. Who told the police they hadn't fired a gun that day? Why would Gary lie about Ben shooting a gun earlier that day with the goose? Now, you really think Gary's that smart that he can put it all the way back down there when he doesn't even know they asked Ben to take a gun shot [1286] residue test until 4:00 in the morning? Ben fire a gun that day? Are you going to believe Gary on that? A shotgun was fired. The shell was in the car. The rifle was fired. The shell was in the car. The pistol was fired. The shell was in the car. Even Mark didn't think it was important enough to lie about it. Yeah, I shot the gun earlier. Yeah, I'll let you do a residue test. Yeah, they didn't send them in. What was it going to show? They had fired a gun. They had already said they had fired a gun. Did they say what gun or when? No. The tests wouldn't tell you that. Just they fired a gun. What did he do? What did he do when they asked? They'd asked him on tape. You heard it. I haven't fired a gun. Not me. Did you take one? Evidence Technician Skidmore, all the way to the magistrate's office, rubbing his hands on his pants. He did that for the same reason he knew he was going to hell. He killed Alex Defilippis.

THE COURT: Thank you, Mr. Schwab.

THE COURT: Ladies and Gentlemen of the jury, originally at the beginning of this proceeding, because of the anticipated length of the trial, the Court

• • •

[1611] things you wanted to tell the Court.

A. Sure.

Q. What is it that you want to tell the Court today?

A. Well, in some of the statements that me and Mr. Barker, Gary, give the cops and some of Gary's testimony from what I understand, it ain't really what happened.

Q. What specifically isn't really what happened?

A. Well, like the robbery, I said that –

Q. Which robbery? There were three that night.

A. Well, all three of them. One of the, in the statements and in Gary's testimony when he testified that it was Ben, he said that, ah, Ben was going to rob the boy. Ben never did because I did. I took Twenty-one ($21.00) Dollars off of him.

Q. So you lied to the police that night?

A. Yeah.

Q. How do we know that you're not lying now?

[1612] A. You tell me. I'm telling the truth now. You know, at the time, I was scared. The investigator started talking all these life sentences, you know, I could get and I got scared man. Throw it off on somebody else.

Q. In there anything else you want to tell the Court?

A. Us see. Not that I can think of.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: Yes, sir.

Q. Did you, you told the police that you saw your brother kill Alexander Defilippis, is that correct?

A. Yeah, that's what I had said, but I, I can't say that for sure. I can't say for sure who killed him, you know, either party. I can't say for sure.

Q. Why's that?

A. Because at the time of the shooting, I was on the other side of the car throwing up all the liquor and beer that I had been drinking throughout the day.

Q. Now, you told the police that you never [1613] exited the vehicle down at Whitethorne Landing. Did you lie then?

A. Yeah. Everything I told the cops I lied.

Q. You are aware that they placed that statement that you gave to the police before the jury, in that correct?

A. Yeah.

Q. And you did nothing to come forward at that point in time?

A. Right.

Q. And why in that?

A. I hadn't been to Court yet.

Q. Please answer any questions that Mr. Schwab might have for you or the Court.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab.

CROSS-EXAMINATION

BY MR. SCHWAB:

Q. So, everything you told the police was a lie?

A. Yeah.

[1614] Q. So you did kill him, is that what you're saying?

A. Ah, –

Q. You told the police you didn't kill him, so if you lied about everything, then you must have killed?

A. I never killed him.

Q. Who killed him?

A. I don't know. I can't say for sure who killed him.

Q. Who had the pistol?

A. At the time of the murder? I can't say for sure because I don't know.

Q. Did you have the pistol before the murder?

A. No.

Q. Who had the pistol?

A. I can't say for sure, you know, because I do not know.

Q. You don't know?

A. Right.

Q. You had the pistol up till the time you

• • •

[1618] Q. Did anybody in your family encourage you to call Mr. Tuck?

A. Huh-uh.

Q. Does it have anything do to with your being here today that there's a custody petition concerning your child pending in the J & D Court?

A. I don't see where my kid has anything to do with it while we are here now.

Q. Well, that's my point. Does it or doesn't it? You didn't call Mr. Tuck until after your mother filed to have custody of your child?

A. That ain't got nothing to do with it, man.

Q. Why do you blame it on Gary Barker instead of your brother?

A. Well, me and Gary we, we've been, we've been in a whole lot of trouble together and Gary knows a whole lot on me and if it was to do over, I wouldn't have told y'all nothing, you know. I wouldn't told y'all nothing. I would have took the Fifth.

Q. So, you don't know that your brother didn't kill him, do you?

• • •

(Filed 10-25-96)

What is the legal definition of "circumferential evidence"?

~~Principal in the~~ second degree to

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY:

COMMONWEALTH OF VIRGINIA

V.

ORDER NO.

BENJAMIN LEE LILLY

Defendant

SS#: 230-96-7040

DOB: 2-29-68

RACE: W

DATE OF OFFENSE(S) DECEMBER 5, 1995

This day came the Attorney for the Commonwealth and the defendant, BENJAMIN LEE LILLY, age 28, who stands convicted of nine (9) felonies to wit:

1. Capital Murder
2. Use of a Firearm in Capital murder
3. Abduction
4. Use of a Firearm in Abduction
5. Carjacking
6. Use of a Firearm in Carjacking
7. Robbery
8. Use of a Firearm in Robbery
9. Possession of a Firearm after having been convicted of a felony

appeared before the bar of this Court in the custody of the sheriff, and came also Christopher A. Tuck and Max

Jenkins, Attorneys-at-law, heretofore appointed by the court to represent the defendant.

Whereupon the accused, who had previously been arraigned and after private consultation with his attorneys plead NOT GUILTY to indictments 1 through 9, which pleas were tendered by the accused in person, requested trial by jury, on all Indictments.

A Jury panel was then summoned and the voir dire of said panel commenced.

Due to the lateness of the hour, Court was adjourned until the following morning, October 16, 1996 at 9:00 a.m.

On October 16, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury panel from the previous day, voir dire continued.

Due to the lateness of the hour, Court was adjourned until the following morning, October 17, 1996 at 9:00 a.m.

On October 17, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury panel from the previous day, voir dire continued.

Due to the lateness of the hour, Court was adjourned until the following morning, October 18, 1996 at 9:00 a.m.

On October 18, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the Sheriff, and came also his Attorneys and the jury panel from the previous day and voir dire continued and was completed.

The Court then impaneled twenty four (24) qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the Attorneys for the defendant each alternately exercised their rights to strike the names of five (5) veniremen from the panel, as provided by law, and the remaining twelve (12), including two (2) alternates, constituting the jury for the trial of the defendant, were duly sworn.

Due to the lateness of the hour, Court was adjourned until the following Monday October 21, 1996 at 9:00 a.m.

On October 21, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury.

After opening statements, the evidence began to be presented by the Commonwealth.

Due to the lateness of the hour, Court was adjourned until the following morning, October 22, 1996 at 9:00 a.m.

On October 22, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Commonwealth continued to put on her evidence.

Due to the lateness of the hour, Court was adjourned until the following morning, October 23, 1996 at 9:00 a.m.

On October 23, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Commonwealth continued to put on her evidence, then rested.

Due to the lateness of the hour, Court was adjourned until the following morning, October 24, 1996 at 9:00 a. m.

On October 24, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury. The Defendant began to introduce his evidence and rested.

Due to the lateness of the hour, Court was adjourned until the following morning, October 25, 1996 at 10:00 a.m.

October 25, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the sheriff, and came also his Attorneys and the jury.

After hearing the evidence, the instructions of the court and argument of counsel, the two alternates were separated from the jury. The jurors were then sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We, the jury, find the defendant, BENJAMIN LEE LILLY Guilty of capital murder.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, Guilty of use of a firearm in the commission of murder.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, Guilty of abduction.

Signed: Michael W. Hyer, Foreman."

"We the jury, find the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of abduction.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of carjacking.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of carjacking.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY, guilty of robbery.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY guilty of use of a firearm in the commission of robbery.

Signed: Michael W. Hyer, Foreman."

"We, the jury, find the defendant, BENJAMIN LEE LILLY guilty of possessing a firearm after having been convicted of a felony.

Signed: Michael W. Hyer, Foreman."

Due the lateness of the hour, Court was adjourned until Monday morning October 28, 1996 at 9:00 a.m.

On October 28, 1996 came again the Attorney for the Commonwealth and the defendant in the custody of the

sheriff, and came also his Attorneys, the jury and the same two alternates.

The Attorney for the Commonwealth and the defendant were given the opportunity to present any additional information prior to fixing punishment for the felony convictions.

After hearing the evidence, the instructions of the Court and argument of counsel, the two alternates were separated from the jury. The jurors were then sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We, the jury on the issue joined, having found Benjamin Lee Lilly guilty of the capital murder of Alexander V. Defilippis during the commission of a robbery while armed with a deadly weapon, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuous serious threat to society and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed: Michael W. Hyer, Foreman."

"We, the Jury, having found the defendant, BENJAMIN LEE LILLY guilty of use of a firearm in the

commission of murder fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the Jury, having found the defendant, BENJAMIN LEE LILLY, guilty of robbery fix his punishment at imprisonment for life.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of robbery fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of abduction fix his punishment at ten (10) years imprisonment.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the commission of abduction fix his punishment at a term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of carjacking fix his punishment at Imprisonment for life.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of use of a firearm in the

commission of carjacking fix his punishment at term of imprisonment of three (3) years.

Signed: Michael W. Hyer, Foreman."

"We, the jury, having found the defendant, BENJAMIN LEE LILLY, guilty of possession of a firearm after having been convicted of a felony fix his punishment at five (5) years imprisonment.

Signed: Michael W. Hyer, Foreman."

On motion of the defendant by counsel, before imposing sentence, the Court directs a Probation officer of this Court to thoroughly investigate and report to the court as provided by law on a date compatible with the court.

The Court certifies that at all times during the trial of the cases, the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The defendant is remanded to jail.

Enter: 28 Oct 1996

/s/ Ray W. Grubbs

Ray W. Grubbs, Judge

ORIGINAL

[LOGO]

Commonwealth of Virginia -
Department of General Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

Western Laboratory
6600 Northside HS Road
Roanoke, VA 24019-2837

January 19, 1996

Tel. No.: (540) 561-6600
Fax: (540) 561-6608
TDD/Voice: (804) 786-6152

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

FS Lab #W95-9074

Your Case: 95-5972

Victim(s): DEFLIPPIS, Alexander

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet

Date Received: 12/28/95

(Filed Oct. 4, 1996)

Item 2 Colt brand .38 Special caliber revolver
Item 18 Fingerprints of Benjamin Lilly
Item 19 Fingerprints of Mark A. Lilly
Item 20 Fingerprints of Gary W. Barker

RESULTS

No latent prints of value for identification purposes are present or were developed on Item 2.

The evidence will be available at the Western Laboratory after you have received the results of all requested exams.

Attest: I certify that I performed the above analysis or examination as an employee of and in a laboratory operated by the Division of Forensic Science, and that the above is an accurate record of the results of that analysis or examination.

/s/ Andrew P. Johnson
Andrew P. Johnson
Forensic Scientist

APJ/mdl

VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA	*PLEA AGREEMENT*
	Case No. CR960136-37-00 thru -07
Plaintiff	
v.	Judge: Ray W. Grubbs
GARY WAYNE BARKER	
Defendant	

This PLEA AGREEMENT is entered into between the Defendant, GARY WAYNE BARKER, his attorneys, JAMES C. TURK, Jr. and FREDERICK M. KELLERMAN, Jr., and the Commonwealth's Attorney or one of his assistants in accordance with Rule 3A:8(c) of the Rules of the Supreme Court of Virginia.

1. Defendant's date of birth is 5/12/76, his age is 20 years, and his Social Security Number is 233-13-3920, and he is the person named in the indictments.

2. Defendant is charged with, and this PLEA AGREEMENT covers, the offense(s) of:

(1) CAPITAL MURDER (Principal in the 2nd Degree);
(2) Use of a Firearm in Capital Murder;
(3) CARJACKING;
(4) Use of a Firearm in Carjacking;
(5) ABDUCTION;
(6) Use of a Firearm in Abduction;

(7) ROBBERY; and
(8) Use of a Firearm in a Robbery.

---

3. Defendant agrees to plead guilty to the above listed eight (8) felony charges, understanding that such pleas are an admission he committed the crimes.

4. The Defendant further agrees NOT to petition the Court for a modification or additional suspension of any sentence imposed in compliance with this PLEA AGREEMENT.

5. The Defendant agrees to testify truthfully, if called as witness, at the trials of Benjamin Lilly and/or Mark Lilly and at the time of the presentation of this PLEA AGREEMENT to the Court he agrees to state, while under oath, whether or not the statements (4) he provided to the police are truthful concerning the events in Montgomery County.

6. Upon Defendant's pleas as set out above, the Commonwealth agrees that the following specific sentence shall be the appropriate disposition of this matter:

> Life in the penitentiary on the charge of MURDER (1st Degree Murder/Capital Murder as a principal in the 2nd Degree);
> 15 years on the charge of CARJACKING;
> 1 year on the charge of ABDUCTION;
> 25 years on the charge of ROBBERY;
> 3 years on each of the four (4) USE OF FIREARM during a felony charges, for a total of 12 years.

The Life sentence is suspended for a period of 75 years on the condition that Defendant shall keep the

peace and be of good behavior and shall comply with the terms of this PLEA AGREEMENT.

The total sentence to serve is 53 years in the penitentiary.

7. It is understood by Defendant that the Court may accept or reject this PLEA AGREEMENT, or postpone its decision to accept or reject it until there has been an opportunity to consider a presentence report of his background and previous criminal history.

8. Defendant understands that if the Court rejects this PLEA AGREEMENT then neither party shall be bound by the agreement and Defendant shall have the right to withdraw his pleas of guilty; that if he does NOT withdraw his pleas the disposition of the case may be less favorable than that provided for by this agreement as the Court may impose any sentence permitted by law for the offenses involved; and that if he does withdraw his pleas, this case will be heard by another judge, unless the parties otherwise agree, and the fact of the pleas entered under this agreement shall not be admissible against him.

9. The Court has not participated in any way in the discussions leading to this PLEA AGREEMENT.

10. Defendant acknowledges and understands that he cannot be promised how much time he may be confined to serve a particular sentence, nor where he will be confined, and, that he will receive credit for any time spent in jail awaiting trial of these charges if such time has not already credited to some other sentence.

11. Defendant understands that, if this agreement is accepted upon his pleas of guilty, he will waive his rights

to a jury trial, to confront his accusers, to not incriminate oneself, to have compulsory process to have evidence and witnesses presented in his behalf, and to appeal the verdict of this Court.

12. Defendant, his counsels, and the Commonwealth's Attorney agree that the written PLEA AGREEMENT contains all the terms of the agreement between them.

13. Defendant acknowledges that he has received a copy of the indictments and discussed them with his attorney; that his attorney has discussed with, and explained to, him the nature of the charges, the elements of the offenses; that he has discussed with his attorney the facts and circumstances of the case, as known to Defendant, and any defenses he may have to the offenses; that each and every particular of this agreement and the effects thereof have been fully explained to him by his counsel; that he has had ample to discuss any defenses to the charges and to decide what his pleas should be; and that he has entered into this agreement freely and voluntarily and without promise of threat from any source, and that he respectfully asks the Court to accept this PLEA AGREEMENT.

ENTERED INTO this 26th day of August, 1996, by and between:

/s/ Gary Wayne Barker
GARY WAYNE BARKER, Defendant

/s/ James C. Turk, Jr.
JAMES C. TURK, Jr.,
Counsel for Defendant

/s/ Frederick M. Kellerman, Jr.,
FREDERICK M. KELLERMAN, Jr.,
Counsel for Defendant

COMMONWEALTH OF VIRGINIA

By: /s/ E. Curtis Schwab, Jr.
E. CURTIS SCHWAB, Jr.
Assistant Commonwealth's Attorney for Montgomery County

The COURT, being of the opinion that Defendants' pleas of guilty and waiver of jury trial are freely and voluntarily made, that he understands the nature of the charges and the consequences of his pleas and the terms of this PLEA AGREEMENT, accepts Defendant's pleas and this PLEA AGREEMENT and its terms this 26 day of August, 1996.

/s/ (illegible)
JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF MONTGOMERY

COMMONWEALTH OF VIRGINIA

V. ORDER NO. 13637

GARY WAYNE BARKER,

Defendant

SS#: 223-13-3290

DOB: 5-12-76

RACE: W SEX: M

DATE OF OFFENSE(S): December 5, 1995

This day came the Attorney for the Commonwealth, and the defendant, GARY WAYNE BARKER, age 20, who stands indicted for eight(8) felonies, to-wit:

1. CAPITAL MURDER, Principal in 2nd Degree;
2. USE OF A FIREARM IN CAPITAL MURDER;
3. CARJACKING;
4. USE OF A FIREARM IN CARJACKING;
5. ABDUCTION;
6. USE OF A FIREARM IN ABDUCTION;
7. ROBBERY;
8. USE OF A FIREARM IN ROBBERY,

appeared before the bar of this court in the custody of the sheriff, and came also, James C. Turk, Jr. and Frederick M. Kellerman, Jr., attorneys-at-law, heretofore appointed by the Court to represent him.

Whereupon the accused was arraigned and after consultation with and being advised by his attorneys, pleaded NOT GUILTY to the indictments, which pleas were tendered by the accused in person, who requested trial by jury.

The Court then impaneled twenty (20) qualified jurors, free from exception for the trial of the defendant.

Whereupon, during the voir dire of the jury, the defendant, by counsel, advised the Court that he wanted to change his plea to GUILTY on all the charges, and no longer desired a trial by jury, and moved the court for addtional [sic] time for the possibility of a plea agreement in these cases, which motion the Court granted, the jury panel was dismissed, and Court was adjourned until one o'clock p.m.

The Court having made inquiry and being of the opinion that the accused fully understood the nature and effect of his pleas and of the penalties that may be imposed upon his conviction and of the waiver of trial by jury and of appeal, and finding that the pleas were voluntarily and intelligently made, proceeded to hear and determine these cases without the intervention of a jury, as provided by law.

The evidence having been submitted to the Court in the form of an oral statement by the Attorney for the Commonwealth following which counsel for the defendant agreed and stipulated that such statement accurately reflected all of the evidence which would be presented by the witnesses if they were called in person.

The Court having been advised by the defendant, his counsel, and the Attorney for the Commonwealth that there has been a plea agreement in these cases, and such agreement in writing having been presented to the Court and now filed herein, the Court accepts said agreement and the pleas of guilty to the indictments by the defendant and finds the defendant GUILTY of all the indictments named above, in accordance with the aforementioned plea agreement, and fixes his punishment at:

1. CAPITAL MURDER, Principal in the 2nd Degree – LIFE IN THE PENITENTIARY;
2. CARJACKING – 15 YEARS IN THE PENITENTIARY;
3. ABDUCTION – 1 YEAR IN THE PENITENTIARY;
4. ROBBERY – 25 YEARS IN THE PENITENTIARY;
5. USE OF A FIREARM DURING A FELONY (4) – 3 YEARS EACH IN THE PENITENTIARY, FOR A TOTAL OF 12 YEARS.

Thereafter, the defendant was placed under oath and shown 4 documents which he identified as transcripts of his interviews with law enforcement officers. Defendant then stated, in response to questions from the Commonwealth's Attorney, that the transcripts were correct and that his statements in the transcripts concerning the events in Montgomery County were true.

It being demanded of the defendant if anything for himself he knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is

accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary as listed above.

The Court, however, deemed it compatible with the public interest so to do, the LIFE SENTENCE is suspended for a period of 75 years upon condition of his good behavior, and upon condition that said defendant pay the costs assessed against him with judgment rate of interest until paid in full.

It is further ordered that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the jail of this County to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

And it is further ordered that, pursuant to §§19.2-310.2 and 19.2-310.3 (DNA) and/or §§18.2-346.1 and 18.2-62 (HIV) of the Code of Virginia, the defendant shall have a sample of blood taken for analysis and shall be responsible for all fees and costs related thereto. The Sheriff shall forthwith take charge of the defendant for the withdrawal of the sample in accordance with the procedures set forth in Article 1.1 of Chapter 18 of Title 19.2 of the Code of Virginia.

The Court certifies that at all times during the trial of these cases, the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

The Court hereby certifies that the sentence IMPOSED as a result of the convictions shown above total:

53 YEARS IN THE PENITENTIARY.

The LIFE SENTENCE was SUSPENDED for a period of 75 years.

The Court ORDERS that the prisoner be allowed credit for time spent in jail awaiting trial.

And the prisoner is remanded to jail to await transfer to the penitentiary.

Enter: August 26, 1996

/s/ Ray W. Grubbs
Ray. W. Grubbs, Judge.

[Logo] ORIGINAL

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

October 4, 1996

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

Your Case #: 95-5972 FS Lab #W95-9074

Victim(s): DEFLIPPIS, Alexander

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet Date Received: 12/28/95

Item 5 Clothing from Benjamin Lilly
Item 5A Boots from Benjamin Lilly
Item 7A Shoes from Gary Barker
Item 6 Clothing and boots from Mark Lilly
Item 7 Clothing from Gary Barker
Item 30 Blood sample from Alexander Deflippis

Evidence Submitted By: W. B. Tolley Date Received: 09/17/96

Item 36 Blood sample from Benjamin Lilly

RESULTS:

Item 5 The clothing from Benjamin Lilly consisted of two (2) socks, belt, underpants, T-shirt, shirt,

over shirt and jeans. Hairs and/or fibers were recovered collectively from the clothing.

Tests indicated the presence of blood on the bottom right leg of the blue jeans. The sample was extracted for DNA analysis. No amplification results at the HLA DQA1 locus or in the PM system (which includes the LDLR, GYPA, HBGG, D7S8 and GC loci) were obtained for this sample.

No blood was detected on the remaining articles of clothing from Benjamin Lilly.

Item 5A No blood was detected on the boots from Benjamin Lilly. Hairs and/or fibers were recovered.

Item 6 The clothing from Mark Lilly consisted of two (2) socks, underpants, T-shirt, jeans and two (2) boots. Hairs and/or fibers were recovered collectively from the clothing.

No blood was detected on the clothing from Mark Lilly.

Items 7 and 7A The requested examinations were terminated following notification by R. L. Hamlin on October 1, 1996.

Items 30 and 36 Human deoxyribonucleic acid (DNA) was isolated from the blood sample from Alexander Deflippis and Benjamin Lilly. The samples were amplified at the HLA DQA1 locus and in the PM system. No additional analysis was conducted.

No hair/fiber examinations will be conducted following notification by Skip Schwab on October 4, 1996.

The results of other requested examinations were the subject of previous reports. -

The evidence is being retained for personal pickup.

Attest:

[Illegible]

/s/ Patricia J. Taylor
Patricia J. Taylor
Forensic Scientist

PJT

[Logo] ORIGINAL

Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

October 4, 1996

TO: R. L. HAMLIN
MONTGOMERY COUNTY SHERIFF'S OFFICE
ATTN: R. F. FLEET
P O DRAWER 149
CHRISTIANSBURG VA 24073

Your Case #: 95-5972 FS Lab #W95-9074

Victim(s): DEFLIPPIS, Alexander (Filed Oct. 7, 1996)

Suspect(s): LILLY, Mark
LILLY, Benjamin
BARKER, Gary

Evidence Submitted By: R. F. Fleet Date Received: 12/28/95

Item 5 Clothing from Benjamin Lilly
Item 5A Boots from Benjamin Lilly
Item 7A Shoes from Gary Barker
Item 6 Clothing and boots from Mark Lilly
Item 7 Clothing from Gary Barker
Item 30 Blood sample from Alexander Deflippis

Evidence Submitted By: W. B. Tolley Date Received: 09/17/96

Item 36 Blood sample from Benjamin Lilly

RESULTS:

Item 5 The clothing from Benjamin Lilly consisted of two (2) socks, belt, underpants, T-shirt, shirt,

over shirt and jeans. Hairs and/or fibers were recovered collectively from the clothing.

Tests indicated the presence of blood on the bottom right leg of the blue jeans. The sample was extracted for DNA analysis. No amplification results at the HLA DQA1 locus or in the PM system (which includes the LDLR, GYPA, HBGG, D7S8 and GC loci) were obtained for this sample.

No blood was detected on the remaining articles of clothing from Benjamin Lilly.

Montgomery General District
CITY OR COUNTY

General District Court [X] Criminal [ ] Traffic

[ ] Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 01/19/95 DATE did unlawfully in violation of Section 18.2-96, Code of Virginia:

steal property, namely 2 two checks

valued at less than $200.00 and belonging to

Jennifer Collins

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of

T.E. Lawson, Officer C'burg PD

PJM 3/24/95, Complainant.

Execution by summons [X] permitted at officer's discretion. [ ] not permitted.

03/10/95 03:39PM
DATE AND TIME ISSUED

/s/ Robert N. Alderman
[ ] CLERK [ ] MAGISTRATE
[ ] JUDGE

Robert N. Alderman, Magistrate

SUMMONS (If authorized above and by serving officer)

You are hereby commanded to appear before this court located at

Main & Franklin Streets Christiansburg, VA 24073
on at ~~AM XPM~~

I promise to appear in accordance with this Summons and certify that my mailing address as shown at right is correct.

X /s/ Illegible
ACCUSED

WARNING TO ACCUSED: You may be tried and convicted in your absence if you fail to appear in response to this Summons. Willful failure to appear is a separate offense.

SIGNING THIS NOTICE DOES NOT CONSTITUTES AN ADMISSION OF GUILT.

FORM DC 314 7/94 PC (114:3 021 5/94)

ACCUSED

Barker, Gary W
LAST NAME, FIRST NAME, MIDDLE INITIAL)

330 Merrimac Rd
ADDRESS/LOCATION

Blacksburg, Va 24060

To be completed upon service as Summons

Mailing address [ ] Same as above [ ]

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO	DAY	YR	HT FT	IN	WGE	EYES	HAIR
W	M	05	12	76	5	06	125	BL	BR

SSN 223-13-3290

Commonwealth of Virginia

WARRANT OF ARREST

CLASS 1 MISDEMEANOR

[X] EXECUTED by arresting the Accused named above on this day:

[ ] EXECUTED by summoning the Accused named above on this day:

[ ] For legal entities other than individuals, service pursuant to § 19.2-76.

3/10/95 3:45 pm
DATE AND TIME

T.E. Lawson, ARRESTING OFFICER

023 Christiansburg P.D.
BADGE: NO. AGENCY AND JURISDICTION

for _____
SHERIFF

Attorney for the Accused:

Illegible

DATE AND TIME
03/15/95 8:3 illegible

4/25/95 illegible

[ ] Motion to Change Bond on:
[ ] changed to $
[ ] no change

_____
JUDGE

The Accused was this day:
[ ] tried in absence
[X] present

Attorneys Present:

Schwabs
[ ] PROSECUTING ATTORNEY (NAME)

Showalter
[ ] DEFENDANT'S ATTORNEY (NAME)

[ ] NO ATTORNEY
[ ] ATTORNEY WAIVED

The Accused PLEADED:
[X] not guilty
[ ] nolo contendere
[ ] guilty

And was TRIED and FOUND by me:
[ ] not guilty
[X] guilty as charged
[ ] guilty of .....
[ ] facts sufficient to find guilt but defer adjudication/disposition and place accused on first time offender probation, §§ 18.2-251 or 19.2-303.2

And was FOUND by me to be:
[ ] driving a commercial motor vehicle
[ ] carrying hazardous materials

[ ] I ORDER the charge dismissed
[ ] I ORDER a nolle prosequi on Commonwealth's motion

[ ] I ORDER the charge dismissed:
  [ ] conditioned upon payment of costs (accord and satisfaction) § 19.2-151
  [ ] conditioned upon payment of costs and successful completion of traffic school § 14.1-123

4/25/95
DATE

[ ] I impose the following Sentence:

[ ] FINE of $_____ with $_____ suspended;

[ ] JAIL sentence of 10 days imposed with _____ suspended conditioned upon being of good behavior and keeping the peace. Credit for time served.

[ ] Serve jail sentence on weekend beginning _____

[ ] Work release authorized if eligible

[ ] Work release required

[ ] on PROBATION for _____

[ ] DRIVER'S LICENSE suspended _____

[ ] Referred to VASAP

[ ] Referred to CDI

[ ] RESTITUTION of $ _____
due by _____
Payable to _____
as condition of suspended sentence.

[ ] _____ hours of community service to be performed for _____
  [ ] in addition to other sentence provisions
  [ ] to be credited against fines and cost at $_____/hr.

[ ] Contact prohibited between defendant and victim/victim's spouse and children pursuant to Va. Code § 18.2-60.3.

[ ] Bond: $_____

[ ] Other: _____

Bail on Appeal $_____

[ ] appeal noted on _____

[ ] Remanded for CCRE Report

Jail time concurrent with time by #950999

DTM

/s/ Illegible
JUDGE

FINE $

COSTS

112)) PROCESSING FEE	$ 22.-
140 113 WITNESS FEE	2.-
Billed 9/27/95	
120 CT. APPT. ATTY.	$ 73.75
125 WEIGHTING FEE	
132 CICF	20.-
133 BLOOD TEST FEE	
229 CHMF	2.-
OTHER (SPECIFY): _____	$
TOTAL	$119.75

109 INTEREST CHARGE
TOTAL WITH
INTEREST CHARGE $
DATE PAID RECEIPT NO

$ discharged by hours
of community service (documentation attached)

REQUEST FOR APPOINTMENT OF A LAWYER

File No. 951651

Montgomery County

CITY OR COUNTY

Commonwealth vs: Gary Barker – Adult

[ ] Circuit Court
[X] General District Court
[ ] Juvenile and Domestic Relations District Court

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER – STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

X /s/ Illegible
ADULT

DATE

The Court was advised that , a lawyer, has been retained to represent the accused in this Court. This information was provided by:

[ ] the above-named person

[ ] the lawyer [ ]

DATE JUDGE CLERK

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

---

[ ] the Adult is not indigent and not entitled to representation by a court-appointed attorney.

[ ] the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel:

[ ] the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel;

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

4-25-95 9:30 A.M.
NEXT HEARING DATE AND TIME

3-21-95
DATE

X Illegible
JUDGE

File No. 506

NAME, ADDRESS OF COURT APPOINTED LAWYER

Joey Illegible

635 9056 3592

FINANCIAL STATEMENT – 3593

Case No. _____

ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

Presumptive Eligibility:

[X] I currently receive the following type(s) of public assistance in Montgomery Co. (City/County)

[ ] AFDC $_____ [X] Food Stamps $_____

[ ] Medicaid

[ ] Supplemental Security Income $_____

Other (specify type and amount)

_____

[ ] I currently do not receive public assistance.

Names and addresses of employer(s) for defendant and spouse:

Self

_____

Spouse

_____

NET INCOME:

	Self	**Spouse**
Pay period (weekly, every second week, twice monthly, monthly)	____	____
Net take home pay (salary/wages, minus deductions required by law)	$___	___

Other income sources (please specify) – see reverse	$___	___	
TOTAL INCOME	$___	+ ___	=COURT USE ONLY A

ASSETS:

Cash on hand	$___	___	
Bank Accounts at:	$___	___	
Any other assets: (please specify)			
with a value of	$___	___	
Real estate–$_____ Net Value	$___	___	
Motor Vehicles			
with net value of Year and Make	$___	___	
with net value of Year and Make	$___	___	
Other Personal Property: (describe)			
_____	$___	___	
TOTAL ASSETS	$___	+ ___	=COURT USE ONLY B

Number in household 2
Number of dependents (spouse/children) whom you support: ___

EXCEPTIONAL EXPENSES

(Total Exceptional Expenses of Family)

Medical Expenses (list only unusual and continuing expenses)	$___	
Court-ordered support payments/alimony	$___	
Child-care payments (e.g. day care)	$___	
Other (describe): _____	$___	
TOTAL EXPENSES	$___	=COURT USE ONLY C
COLUMN "A" plus COLUMN "B" minus COLUMN "C" equals available funds		=COURT USE ONLY

THIS STATEMENT IS MADE UNDER OATH: ANY FALSE STATEMENT OF A MATERIAL FACT TO ANY QUESTION CONTAINED HEREIN SHALL CONSTITUTE PERJURY UNDER THE PROVISIONS OF § 19.2-161 OF THE CODE OF VIRGINIA. THE MAXIMUM PENALTY FOR PERJURY IS CONFINEMENT IN THE PENITENTIARY FOR A PERIOD OF TEN YEARS.

I hereby state that the above information is correct to the best of my knowledge.

Name of defendant
(type or print) /s/ Gary Wayne Barker

3/15/95 — Date
/s/ Gary Wayne Barker — Signature

Sworn/affirmed and signed before me this day.

3/15/95 — Date
Illegible — Signature

Judge — Title

3593

SUPREME COURT OF VIRGINIA

Supreme Court of Virginia
AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

OPENING BRIEF OF APPELLANT

Max Jenkins
JENKINS & JENKINS
Post Office Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
ATTORNEY AT LAW
805 Triangle Street
Post Office Box 11422
Blacksburg, VA 24062
(540) 552-4567

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CASES/CITATIONS/AUTHORITIES

PAGES

CODE OF VIRGINIA, AS AMENDED 1950

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Appellant received the death penalty in this Capital Murder case. He and two others, including his brother Mark Lilly, were charged with several crimes. The Appellant was charged with being the trigger man in the robbery and murder of Alexander DeFillipis.

Appellant's brother, Mark Lilly, who was brought in as a witness without being given immunity, refused to testify, asserting his 5th Amendment right. His statements to police would later be read to the jury. Moreover, Mark Lilly would later admit under oath that he had lied to police.

At trial, certain objections and exceptions were made by the defendant. The defendant alleged error from the selection of certain jurors; error in the display by the Commonwealth at counsel table a photograph of the victim in life; error by the Commonwealth's Attorney in his closing argument by pointing the murder weapon toward defense counsel and Appellant; the admission of two hearsay statements of Appellant's brother after the assertion of the brother's 5th Amendment rights.

The two statements made by Appellant's brother contained much more than a declaration against the interest of the brother. The statements introduced and approved by the Court contained statements by police officers that they in effect did not believe that Mark Lilly had killed DeFillipis, but that they believed in fact that Appellant was guilty of the murder. Obviously, this is an opinion as to the innocence or guilt of Appellant, Benjamin Lee Lilly, and is not admissible.

STATEMENT OF FACTS

At the start of this trial, the Commonwealth displayed in full view of the jury a framed portrait of the victim in life. After the Court ruled that the Commonwealth should not have placed the photograph, a motion for mistrial was denied.

The evidence most favorable to the Commonwealth indicates that the Appellant, his brother Mark Lilly, and Gary Barker burglarized a home in Floyd County, Virginia and thereafter travelled to Radford, Virginia to the home of a friend, where personal property taken from the burglary was divided. All three men were drinking heavily. The Court would refuse an instruction on voluntary intoxication.

After travelling to several places within Montgomery County, Virginia, the automobile in which the three were travelling became disabled near a convenience store, Hethwood Express, in Blacksburg, Virginia.

The murder victim, Alexander DeFillipis, had driven a friend to the convenience store. The evidence indicates that while DeFillipis' friend was inside the store, the Appellant carjacked the vehicle and, along with Mark Lilly and Barker, took Alexander DeFillipis with them to a secluded spot in Montgomery County, Virginia where the three forced DeFillipis to disrobe. Shortly thereafter, DeFillipis was shot three times in the head, killing him instantly.

The three travelled from the scene of the murder to Eggleston, Virginia and Pembroke, Virginia, where they robbed two stores. The three were apprehended after the

robberies; Barker and Mark Lilly unsuccessfully attempted to flee from police.

A portion of the Commonwealth's evidence consisted of blood found on the back of Appellant's pants leg, which could not be determined to be of human origin. Appellant objected to the admission of a statement allegedly made by Appellant to Chief Whitset.

Appellant objected also to evidence being introduced regarding his refusal to participate in a paraffin test after he had been advised erroneously by investigating officers that participation was voluntary.

Objection was also made to the admittance of the medical report as evidence on the grounds that it was hearsay and that the medical examiner appeared in court and had testified to the jury concerning item in the report.

Objection was also made to one of the Commonwealth's chief witnesses, co-defendant Gary Barker, having read prior newspaper articles that the Court ordered witnesses not to read. (Barker was not present when this admonishment was given.)

The main evidence linking the Appellant to the crimes was co-defendant Gary Barker and two taped statements of co-defendant Mark Lilly, Appellant's brother. The Court ruled that Mark Lilly's assertion of his 5th Amendment rights resulted in his being unavailable. Objection was made to the taped statements in which Mark Lilly told an investigator, "we had nothing to do with the shooting." He further stated that "we" meant Mark Lilly and Gary Barker. The statement of Mark Lilly

contained statements of the police (giving opinions of defendant's guilt), and statements that Mark Lilly and Barker thought the Appellant was going to let DeFillipis go. The statement of Mark Lilly named Appellant as the trigger man, placing Appellant as the person facing the death penalty.

The Court also refused to give an instruction on voluntary intoxication and an instruction stating that if the jury had a reasonable doubt as to punishment (life or death), they had to impose the lower grade of life imprisonment.

Gary Barker's testimony also implicated Appellant as the trigger man.

During closing arguments, the Commonwealth's Attorney pointed the murder weapon in the direction of defense counsel and Appellant. A mistrial was requested, but again refused.

IN THE SUPREME COURT OF VIRGINIA

BENJAMIN LEE LILLY,	)	
Appellant	)	
v	)	**Record No. 972386**
COMMONWEALTH OF VIRGINIA,	)	
Appellee	)	

AMENDED ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

Now comes the Appellant and pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia and assigns as error the following:

ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to seat Ms. Huffman as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 118-153.

2. The trial court erred when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Page 330.

3. The trial court erred when it refused to seat Kristine Mitchell when she indicated that she could follow

the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2, Pages 390-418.

4. The trial court erred when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Page 501-526.

5. The trial court erred when it sat James Rakes as a juror when he indicated he would believe Chief Whitsett more than other witness because he knew Chief Whitsett, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 576-605.

6. The trial court erred when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Hamlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript Volume 2A, Pages 606-626.

7. The trial court erred when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution. Transcript Volume 2A, Pages 645-656.

8. The trial court erred when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could

follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution. Transcript volume 2B, Pages 936-952.

9. The trial court erred when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution. Transcript Volume 2B, Page 957-964.

10. The trial court erred when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 212-215, Transcript Volume 2, Page 198, and Transcript Volume 2B, Pages 783-784 and 1011-1013.

11. The trial court erred when it refused to allow the defense to educate the jury during voir dire in regard to the option life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 138-140 and 273-274.

12. The trial court erred when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 207-209.

13. The trial court erred when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and

fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 220-222.

14. The trial court erred when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 220-232. Transcript Volume 5 pages 1394-1395.

15. The trial court erred when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 240-264 and Transcript Volume 1, Page 14-18, 249, 250, 251, 252.

16. The trial court erred by allowing a juror who had read a newspaper article about Mr. Lilly's past to remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 17-18.

17. The trial court erred in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23 and Transcript Volume 4, Pages 773-777, statement made

between pages 813-814, 847-848 and 866-867, Transcript Volume 5 pages 1303, 1587-1598, 1610-1620 and 1652-1653.

18. The trial court erred when it determined that a co-defendant's statement met the criteria set forth in *Chandler v Commonwealth*, 249 Va 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 22-23; Transcript Volume 4, Pages 773-790, 847-848, and 866-867; Transcript Volume 5, Pages 1303, 1587-1598, 1610-1620, and 1652-1653.

19. The trial court erred when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 54-56 and 93-94.

20. The trial court erred in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 302.

21. The trial court erred when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 545-546, and 561.

22. The trial court erred in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Pages 551-560, and 577.

23. The trial court erred when it refused to declare a mistrial after a co-defendant, (Barker) read an article on the newspaper concerning the trial despite the fact that Barker was sequestered, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 3, Page 29-40, 674-675.

24. The trial court erred when it allowed a police officer (Officer Whitsett) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 149-185, 268-273. Transcript Volume 4, Pages 758, 864. Transcript Volume 5, Pages 1541-1542.

25. The trial court erred when it allowed statements allegedly made by the Defendant to Chief Whitsett when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 154-185, 268-273.

26. The trial court erred when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct

that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 888-892, 904.

27. The trial court erred when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1193-1196.

28. The trial court erred when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Pages 1279-1292, 1310-1311, and 1317-1321.

29. The trial court erred at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1486.

30. The trial court erred when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1492-1493.

31. The trial court erred when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 5, Page 1498.

32. The trial court erred when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Page 282.

33. The trial court erred when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution. Transcript Volume 1, Pages 266-268.

34. The trial court erred when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution. Transcript Volume 4, Pages 789-793, and 811.

QUESTIONS PRESENTED AND ARGUMENT IN SUPPORT

1. Did the trial court err when it refused to seat Ms. Huffman as a potential Juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.510-545)

2. Did the trial court err when it refused to seat Janet Matheson on the ground that she indicated that she probably could not impose the death penalty in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.716-722)

3. Did the trial court err when it refused to seat Kristina Mitchell when she indicated that she could follow the law and impose the death penalty. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A782-812)

7. Did the trial court err when it refused to seat Leona H. Wallace as a potential juror in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United Stated Constitution? (A.1039-1050)

8. Did the trial court err when it refused to seat Ollie M. Jones when Ms. Jones clearly stated that she could follow the law. That said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1335-1351)

9. Did the trial court err when it failed to seat Ms. Mumaw in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution? (A.1356-1363)

During the voir dire process the trial court struck several jurors for cause when they indicated opposition to the death penalty. The trial court, especially in the cases of Ms. Huffman, Ms. Mitchell and Ms. Jones, abused its discretion and struck the jurors for cause.

Beginning with Connie Huffman, the trial court struck for cause because of a concern about the juror's ability to apply the death penalty. Ms. Huffman stated to the trial court that she could impose a death penalty and that she would follow the trial court's instruction and follow the law. During her entire questioning by the trial court and counsel regarding her ability to perform her duty, Ms. Huffman stated that while she didn't believe in the death penalty, if she had to be on the case "I would be fair in what my decision would be." (A.514) Moreover, when asked by the trial court if her belief or opinion would impair her from imposing the death penalty, Ms. Huffman stated that "I don't think that would be any problem." *Ibid.*

In regard to Janet Matheson, Appellant concedes that Ms. Matheson did express an inability to impose the death penalty due to her beliefs, however the Appellant maintains that he is entitled to a jury of his peers and that by striking Ms. Matheson the trial court denied the defendant that right.

The third juror struck was Kristina Mitchell. Ms. Mitchell stated to the trial court that she was struggling with her own beliefs regarding the death penalty, however she indicated that she could follow the law and impose the death penalty. (A.786) Over the entire questioning Ms. Mitchell agreed to follow the trial court's

instruction which included possible imposition of the death penalty. Specifically, when asked by the trial court whether her beliefs would impair her responsibility, Ms. Mitchell stated "No," that they would not effect her responsibility. (A.810)

Regarding Ms. Wallace the Appellant concedes that Ms. Wallace expressed a reluctance to set aside her beliefs, but she indicated that she would be able to follow the law.

Ms. Jones indicated that she had spoken to her minister and felt that she could serve as juror. (A.1340) She did indicate it would be difficult to sit in judgement of another person and sentence someone to death, but would the trial court desire someone who took that duty lightly? When viewing the entire voir dire it is clear that Ms. Jones understood her duty as a juror and was capable of carrying it out.

The Appellant concedes that Ms. Mumaw expressed an opinion that she could not impose the death penalty. However, the Appellant argues that he is entitled to a jury of his peers and that by excluding Ms. Mumaw the trial court denied the defendant that right as provided by the U.S. constitution.

In determining whether the trial court abused its discretion this Court has stated that several factors must be considered on appellate review. First, the juror's views would have to substantially impair or prevent their performance of their duties as a juror; second, the trial court's decision will not be disturbed unless there is manifest error because the trial court is in a position to view and hear the juror; and third, that this Court will

review the entire voir dire, not a single question. *Barnabei v Commonwealth*, 252 Va. 161, 173, 477 S.E.2d 270 (1996).

When applying the law to the matter at hand the Appellant maintains that trial court abused its discretion, especially when examining Ms. Huffman, Ms. Mitchell and Ms. Jones. The Appellant maintains such abuse in discretion rose to the point of being a manifest error. Ms. Huffman on several occasions maintained that she could be fair and set aside her own beliefs and apply the law. However, the trial court ignored Ms. Huffman's responses and focused in on her belief about the death penalty. The law requires that the belief must substantially affect the juror's ability to perform their duty, but Ms. Huffman maintained throughout her voir dire that she could fulfill that duty. Ms. Jones made the same commitment to serve responsibly as a juror.

4. Did the trial court err when it refused to allow defendant's Counsel to explore questions outside of the approved list violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.916-920)

The Appellant maintains that when the trial court banned the defense from deviating from the approved list of questions, it deprived the Appellant from asking relevant questions of the potential jurors as allowed for by *Buchanan v Commonwealth*, 238 Va. 389, 384 S.E.2d 757, (1989). Thereby the trial court abused its discretion and violated Virginia code § 8.01-358.

5. Did the trial court err when it sat James Rakes as a juror when he indicated he would believe Chief Whitset more than other witness because be knew Chief Whitset, in violation of the Defendant's rights

as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.970-999)

6. Did the trial court err when it sat Samuel Shumate as a potential juror when Mr. Shumate stated that he was a second cousin to an investigator, Ron Ramlin, who was involved in the case and whom the defense stated that they intended to attack, and Shumate considered Mr. Hamlin to be a "real close friend"; said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments to the United States Constitution? (A.1000-1020)

On two occasions the trial court failed to strike jurors for cause when it was clear that neither James Rakes nor Samuel Shumate were impartial as required by the United States Constitution, the fifth and eighth through the fourteenth Amendments.

On Page A.988 of the Joint Appendix Mr. Rakes gives a clear and honest answer that he would believe Chief Whitset more than other witnesses because of their relationship. In addition, when asked whether he would give Whitset more credibility than other witnesses Rakes states "(i)t's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do." (A.988) When the trial court questioned Rakes about his ability to view all witnesses with the same weight, Rakes responded "No, your Honor, I think what I meant to say was I'd probably start off at a different point because you do have some familiarity, some knowledge and some past about that person, may be you would start with a different feeling when you first began, but I don't know that would carry on through

all the testimony." (A.997) Clearly, by all of Rakes' statements he felt that he would give Whitset more credibility at the start of his testimony then other witnesses. Whitset was also an important witness in the case because of alleged statements that Lilly may have given to him. Whitset's creditability was brought directly into question as to what he believed he heard Lilly say. The trial court was aware of Whitset's importance, because the trial court had heard a motion to suppress the statement months before. Defense counsel was forced to use one its preemptory challenges to strike Rakes.

In Mr. Shumate's case, Shumate testified that he was related to Investigator Hamlin and that Shumate consider Hamlin to be a "real good friend." (A.1016) Moreover, the defense informed the trial court that they intended to call Hamlin and criticize some of his work on this case. Defense counsel did just as it had proffered and attacked the manner in which Hamlin had handled pieces of evidence. Hamlin was also one the investigators who questioned Mark Lilly.

In objecting to Rakes and Shumate, defense counsel cited *Breeden v Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976), which holds that a defendant has a constitutional right to a fair and impartial jury and that all that is needed to strike a juror is reasonable doubt. (See also *Wright v. Commonwealth*, 73 Va. (32 Gratt.) 941 (1879). In applying the law to the matter at hand it becomes clear that reasonable doubt was present regarding both Rakes' and Shumate's impartiality due to their relationships to prospective witnesses, thereby violating Appellant's constitutional rights to a fair and impartial jury.

10. Did the trial court err when the venue of the case was not changed in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.305-308, 590-591, 1181-1182, 1410-1412)

The defense filed several affidavits to show that there was community prejudice towards the Lilly. Radio, television and newspaper articles recite inflammatory, hostile and prejudicial accounts of Lilly and the crime for which he was charged. These reports also included conclusory labels about Lilly which were prejudicial in nature, such as the *Roanoke Times* editorial calling Lilly a "thug" and asking why the [sic] he wasn't incarcerated. In addition the newspapers reported sympathetic information about the victim. In a Virginia capital case the trier of fact cannot receive a victim impact statement before the sentencing phase of the trial which describes the victim and the effect his death had on his survivors as well as the Community.

Moreover, the publication of Lilly's prior record was highly prejudicial. Numerous articles referred to Lilly's prior criminal record. Such publication created an opportunity for the jury's verdict to rest on impermissible grounds. The widespread publicity concerning the nature of the alleged offenses and Lilly's alleged involvement presented a reasonable likelihood that Lilly would be denied his constitutional right to a fair trial and impartial jury. Therefore a change of venue under Va. Code Ann. § 19.2-251 was necessary to protect Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

11. Did the trial court err when it refused to allow the defense to educate the jury during voir dire in regard to the option of life in prison without the possibility of parole in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.231-233, 366-367)

On two separate occasions, defense attempted to educate the jurors before the sentencing phase in regard to the fact that Parole has been abolished for those in Virginia who are convicted under the capital murder statute. Specifically, counsel proffered the following question to the trial court; "Would you be more likely to objectively consider life in prison if you knew that a sentence of life in prison means that the person would not ever become eligible for parole?"

Appellant maintains that by refusal to allow defense counsel to educate the jury during voir dire prohibited him from obtaining a fair and impartial jury. The United States Supreme Court held in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994) that the defendant had a right to educate the jurors that life in prison meant life in prison. However, in order to properly voir dire the jurors, the Appellant needed the ability to inform the potential jurors that if convicted Lilly would not be released until his death. Appellant maintains that this was a violation of his rights as guaranteed by the fifth and sixth through the fourteenth Amendments of the United States Constitution.

12. Did the trial court err when it denied the Defendant's request for a Bill of Particulars when the information that was being sought was going to be used to challenge the constitutionality of the death

penalty. That said error was a violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.300-302)

31. Did the trial court err when the Commonwealth at the penalty stage was not ordered to give a Bill of Particulars of the aggravating factors that the Commonwealth would use, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2982-2983)

In order to ensure effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States, Appellant in this case attempted to determine the appropriateness of a motion to dismiss the capital indictment upon which this prosecution was based were unconstitutional as applied in this action.

Appellant argued that the statute may be unconstitutional as applied in this case because, inter alia, (1) the evidence for the Commonwealth may, as a matter of law, have been obtained unconstitutionally or be insufficient to establish the elements of capital murder, or (2) the Commonwealth may seek to apply one or more of the aggravation factors necessary to render defendant eligible for a sentence of death in an unconstitutional manner or the evidence may, as a matter of law, be insufficient to support a sentence of death.

Notice and opportunity to be heard are the cornerstones of due process of law. *Lankford v Idaho*, 500 U.S. 110, 127 (1991); *Goss v Lopez*, 419 U.S. 565, 579 (1975). Further, due process requires that a defendant be given

notice and opportunity to defend against the Commonwealth's case for death. *Simmons v South Carolina,* 114 S.Ct. 2187 (1994); *Lankford v Idaho,* 500 U.S. 110 (1991); *Gardner v Florida,* 430 U.S. 349 (1977). In addition, the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages. *Lockett v Ohio,* 438 U.S. 586, 604 (1976). The Virginia Supreme Court has held that the indictment gives notice of the offense. *Beard v Commonwealth,* 248 Va. 68, 445 S.E.2d 670 (1994); *Mickens v Commonwealth,* 247 Va. 395, 442 S.E.2d 678 (1994). The indictment, however, gives no notice of aggravating factors, including the constitutionally required narrowing construction if the government will rely on the "vileness" factor.

Appellant, in demanding that the Commonwealth identify its evidence, did not seek discovery. Copies of statements of the Commonwealth's witnesses and scientific evidence, for example, were not sought in the motion for the Bill of Particulars. Rather, Appellant sought and was entitled to have the Commonwealth identify its evidence so that proper pretrial challenges to the application of Virginia's capital murder statute in this case could have been made where appropriate. The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the law of Virginia both authorize that the bill of particulars be granted when challenging the constitutionality of a statute.

Va. Code Ann. § 19.2-266.2 requires the defense to raise a motion to dismiss an indictment or any count thereof, on the ground that a statute upon which it is based is unconstitutional, by written motion or objection prior to trial, which is what counsel did in this matter.

Additionally, defense motions for suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Constitution of the United States or the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination must be raised by written motion or objection prior to trial.

The statute further requires that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2230." The appellant requested a bill of particulars in order to move for dismissal of the capital indictment or to prohibit imposition of the death penalty an the grounds that Va. Code Ann. § 18.2-231 and Va. Code Ann. § 19.2-264 were unconstitutional as applied in this case. However the trial court denied Appellant's motion.

A motion to dismiss an indictment on the grounds that the underlying statute is unconstitutional on its face requires no such information; for example, a bill of particulars is not sought in aid of defendant's motion to prohibit imposition of the death penalty alleging systemic deficiencies in Virginia death penalty statutes. The indictment and the underlying statute are sufficient grounds to make this motion.

The Appellant argued in contrast, Va. Code Ann. § 19.2-266-2 requires the Commonwealth to provide such in order for the defense to make a timely motion to dismiss the capital indictment on the grounds that the underlying statutes are unconstitutional as applied to this

defendant, in that the time, place, manner, and means of the crime are constitutionally insufficient and cannot support either the capital indictment or the imposition of the death penalty.

The motion for a bill of particulars requests identification of all evidence upon which the Commonwealth intends to rely in seeking a capital murder conviction or imposition of the death penalty. Such identification is essential to enable the defendant to determine whether to move for suppression of the evidence on the grounds that it was obtained in contravention of the constitution.

The Supreme Court of Virginia has held that "[t]here is no general right to discovery in a criminal case, even where a capital offense is charged." *Strickler v Commonwealth*, 241 Va. 482, 490, 404 S.E.2d 227, 233 (1991). However, recognizing that the line between general discovery and a bill of particulars is difficult to draw, the General Assembly has determined that because notice of evidence to support a defendant's pre-trial motions under § 19.2-266.2 is compelled by the Sixth, Eighth and Fourteenth Amendments, the trial court is required by that statute to direct the Commonwealth to file a bill of particulars upon motion of the defendant.

It has been repeatedly held by the Virginia Supreme Court that it is the duty of the trial court to compel the attorney for the Commonwealth, when demanded by the accused, to file such bill of particulars as will apprise the defendant of the cause and nature of his accusation. *Riner v Commonwealth*, 145 Va. 901, 134 S.E. 542 (1926). In a capital case, the cause and nature of the allegation include those factors the Commonwealth must prove in

order to render a defendant eligible for a sentence of death. The United States Supreme Court also has noted that, in order for the requirements of due process to be met and for the adversarial system to work properly, counsel must be given "a meaningful opportunity to present a complete defense," *Crane v Kentucky*, 476 U.S. 683, 690 (1986), and that a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v Florida*, 430 U.S. 349, 362 (1977). This requires notice of all such facts that will influence the sentencing decision. *Simmons v South Carolina*, 114 S.Ct. 2187 (1994) (due process requires that a defendant be permitted to rebut the future dangerousness aggravating factor with evidence of parole ineligibility if sentenced to life in prison); *Lankford v Idaho*, 500 U.S. 110, 126 (1991) (lack of notice that the death sentence may be imposed by the trial judge, even though the prosecutor was not requesting the death penalty, created an "impermissible risk" that the adversarial system would not function properly).

In Virginia, the Commonwealth must prove one of two aggravating factors to support the death penalty. The jury may impose a death sentence only if it finds that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery (the "vileness" factor), or that the defendant would commit criminal acts of violence in the future that would constitute a continuing serious threat to society (the "future dangerousness" factor). Va. Code Ann. § 19.2-264.4 (1990).

The Virginia "vileness factor" requires narrowing constructions to further distinguish its application because it uses broad, vague term that could apply to any murder. *Maynard v Cartwright*, 486 U.S. 356 (1988). The narrowing construction becomes, in effect, a limitation and clarification of the offense charged. The Supreme Court has flatly held that the language used in Georgia's "vileness" factor was constitutionally deficient.

Similarly, Virginia's "future dangerousness" aggravating factor is comprised of broad, vague terms that could apply to any murder. *Maynard*, supra. No limitation nor clarification of the overly broad offense described is provided to sentencers. Therefore, a constitutionally sufficient narrowing construction of the "future dangerousness" aggravator is also required. *Ibid.*

Furthermore, not all narrowing constructions are sufficient to meet constitutional requirements. *Shell v Mississippi*, 498 U.S. 1 (1990).

The appellant maintains Va. Code Ann. §19.2-266.2 required the trial court to order the Commonwealth to file a bill of particulars for this defendant. Further, for a capital defendant to have constitutionally adequate notice and opportunity to defend himself, it was essential that the Commonwealth provide the Appellant with both the aggravating factors and the narrowing constructions thereof upon which the Commonwealth intends to seek the death penalty. Finally, Va. Code Ann. §19.2-230 permits the trial court judge to order the Commonwealth to file a bill of particulars at his discretion; by failing to order a bill of particulars the trial court abused its discretion.

13. Did the trial court err when it admitted graphic photographs of the victim in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-315)

14. Did the trial court err when it refused the Defendant's request to introduce black and white photographs of the victim and crime scene instead of color photographs, which were more inflammatory and violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.313-328, 2878-2879)

20. Did the trial court err in the admission of the video tape depicting the victim and the crime scene, in violation the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1741)

22. Did the trial court err in allowing evidence that there was blood on the clothing of Benjamin Lee Lilly, which blood could not be determined to be human or animal, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1990-1999, 2016)

32. Did the trial court err when they allowed the Commonwealth to introduce a felony conviction for purpose of showing that the defendant was a convicted felon when the defendant agreed to stipulate that the defendant had been convicted of a felony, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.375)

On several occasions the trial court admitted evidence that was more prejudicial than probative.

During pretrial motions, Appellant moved to exclude color photographs and videotape of the victim after the murder. While some of the photographs may have been necessary to prove elements of the crime, the prejudicial effect would have been diminished if the trial court had required the Commonwealth to introduce black and white photographs. Lilly argues that the trial court, in failing to require black and white photographs and videotape, abused its discretion.

In addition, the trial court abused its discretion when it allowed evidence that blood was found on the back of Lilly's pants when there could be no determination as to the type of blood (whether it was human or animal blood) or as to the age of the blood. Moreover, the three co-defendants had killed a goose earlier in the day, the carcass and blood of which were found in the trunk of Benjamin Lilly's car.

Finally, the trial court refused to allow the defendant to stipulate that he was a convicted felon, instead allowing the prosecution to admit a prior malicious wounding conviction.

Coe v Commonwealth, 231 Va. 83, 340 S.E. 820 (1986) held that when relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy must be weighed against tendency of proffered evidence to produce passion and prejudice out of proportion to its probative value.

In examining the issues at hand Lilly maintains that the inflammatory nature of the photographs and videotape, the testimony regarding the unidentifiable blood on

Lilly's pants, and the fact that the trial court would not allow Lilly to stipulate that he was a convicted felon outweighs their probative value. In particular, there was absolutely no reason, except for inflaming the jury, that the Commonwealth needed to introduce Lilly's felony conviction when he agreed to stipulate this element.

15. Did the trial court err when it allowed the jury to hear evidence of the Defendant's refusal to take a paraffin test, (gun residue test), when he was advised by the Government that he had a right to refuse such a test and that it was voluntary. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.333-357, 1437-1441, 1688-1691)

The defendant was erroneously advised by the government that such a test was voluntary on his part. Based on this statement, he refused this test.

His refusal was used as evidence against him. It is completely unfair for the defendant to be advised erroneously and then the government to get the benefit of his refusal. This could create all types of abuse in the future an the part of police. Clearly the admission of this testimony was in error. It has been held that silence cannot be used against a defendant. *Escobedo v. Illinois*, 378 U.S. 478 (1964). Certainly an erroneous statement by the government causing the defendant to engage in a course of conduct should also not be used against the defendant.

16. Did the trial court err by allowing a juror who had read a newspaper article about Mr. Lilly's past to

remain in the jury panel in violation of the Defendant's rights as guaranteed the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1438-1441)

A juror who has knowledge of specific acts of misconduct not related to the crime should not be seated. As a matter of Constitutional guarantee, the accused is entitled to a fair trial. Cases in Virginia have held that if certain preconceived opinions of jurors (for example, stemming from newspaper articles) cannot be removed by the trial judge, those jurors should not be seated.

However, in this case a juror learned of other specific acts not related to the murder charge from a newspaper article (A.36), which told of Appellant being on parole.

It is submitted that this juror, having knowledge of Appellant's prior criminal record, should have been struck for cause.

17. Did the trial court err in the admission of evidence of a co-defendant's statement whom the court ruled was not available and that the statements were admissible as statements against penal interest. Said error violated the Defendant's rights as guaranteed by the confrontation clause, the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Appellant is mindful of *Chandler v. Commonwealth*, 249 Va. 270 (1995), which held that Chandler's girlfriend's statements against her penal interest were admissible. The girlfriend's statement described riding in an automobile with Chandler and others to obtain a gun, and Chandler's discussion about "going in, robbing the

store and leaving." The girlfriend's statement also contained other statements further inculpating Chandler. The Chandler case appears to be the first case in Virginia that allowed the confession or statement of a co-defendant that was not exculpatory to the accused. It is submitted that Chandler and subsequent cases created a "new" exception to the hearsay rule and violates the defendant's 6th Amendment rights to confront and cross-examine.

The rule in Chandler has been upheld in subsequent cases, the most recent of which was *Randolph v Commonwealth*, 24 Va. App. 345 (1997). This case involved the admission of a co-defendant's statement during a joint trial with the defendant. This case also held that the confrontation clause was not violated by the admission of such a statement. This statement was allowed although made after the conspiracy had ended.

(From a reading of *Chandler* or *Randolph*, there is nothing to indicate that any statement of a police officer was admissible, nor were the opinions of a police officer admissible. The entire statement admitted in *Chandler* at page 278 concerned the factual conduct of Chandler's girlfriend; about Chandler robbing the store and about her acting as the driver of an automobile in the commission of this crime.

This court held that the girlfriend's statement qualifies as admissible hearsay and quoted *Ellison v Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978), (citing *Hines v Commonwealth*, 136 Va. 728, 117 S.E. 843, (1923).

In Ellison, it was the defendant, Ellison, (not the Commonwealth), who sought to have a statement admitted given by Joseph Brown indicating that he was the

perpetrator of a crime. This statement was exculpatory and aided Ellison.

In *Hines,* (also quoted in the Chandler case) a rule (that at the time was beneficial to the defendant), was adopted that was "out of line with the current of authority" and held that the evidence of an extra judicial confession exculpatory of the accused and made by a dead or otherwise unavailable witness, is admissible as an exception to the hearsay rule. (Please note in *Hines* that this was again the defendant who sought introduction of a hearsay statement). The Court held that the evidence of an extra judicial confession exculpatory of the accused was admissible.

The same rule was later affirmed in *Newberry v Commonwealth,* 191 Va 445, 61 S.E.2d 318 (1950), (requiring the statement to be exculpatory to the defendant), but none of these cases has ever allowed, prior to the Chandler case, these statements to be used Upon the request of the Commonwealth. In these cases, the person who made the statement was not present in court. It is submitted that there has not been a well established hearsay rule in the State of Virginia that allowed these statements to be used by the Commonwealth. The Commonwealth had such statements exculpatory to the accused, admitted against the government, because the Commonwealth does not have the right to confrontation. The rule established in *Chandler* creates an exception to the hearsay rule, which it is submitted cannot be used against the defendant, because it bars his right to confront that witness.

It is further submitted that in none of these cases were the opinions of a police officer, expressing his belief

in the defendant's guilt, allowed to be entered as evidence.

As further proof that this rule was not intended to be used by the Commonwealth, it is submitted that *Chambers v Mississippi,* 410 U.S. 284, 93 S.Ct. 1039 (1973), makes this clear. This was a Mississippi rule barring, (in Mississippi one cannot not call a witness and then impeach him), the admissions of declarations against penal interest, which the defendant in *Chambers* sought to have introduced. (Chambers sought to introduce a confession and other admissions that McDonald had killed the person, for impeachment). The Court refused to admit, on behalf of the defendant, evidence of a third party confession and statements against third parties. The United States Supreme Court in *Chambers* stated that the Third Party Confession should come in for the benefit of the defendant and further stated, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." The Court found that such exclusion denied the defendant's due process of law and reversed, finding that the right to confront and cross examine a witness has long been recognized as essential to due process.

The admission of such a statement is historically discussed in *Ellison,* at 404. This rule, which apparently had been adopted solely for the defendant's benefit, was "out of line with the current of authority". At *Ellison,* they particularly stated that the admission of this rule, "of an extra judicial confession, exculpatory of the accused and made by a dead or otherwise unavailable witness is admissible as an exception to the hearsay rule".

There is nothing indicated in the Virginia cases, prior to *Chandler,* that the rule which has been narrowly interpreted by this Court, should ever allow the Commonwealth to introduce a statement of third party implicating the defendant as was done in this case and in *Chandler;* and there is equally no language in the prior opinions allowing the statements in such a written confession containing statements of police officers that they believed the third party was telling the truth about the defendant killing a victim.

The rule of the admission of a declaration against interest or a confession prior to 1995 as an exception to the hearsay rule was only admissible in approximately five states, Virginia being one of them.

The statements in *Chandler* and the subsequent cases violate the constitutional rights of the defendant and certainly the statements of the police officers were hearsay.

18. Did the trial court err when it determined that a co-defendant's statement met the criteria set forth in *Chandler v Commonwealth,* 249 Va. 270, 455 S.E.2d 219 (1995) and the requirements of the confrontation clause. Said error violated the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1445-1446, 2212-2225, 2253-2282, 2318-2332, 2350-2359, 2787, 3071-3082, 3094-3117, 3136-3137)

The Commonwealth over the Defendant's objections, introduced an out-of-court statement made by a co-defendant that specifically addressed the issue of guilt of the Defendant. The trial court held, after determining that Mark Lilly was unavailable, that his statement was

admissible under *Chandler v Commonwealth,* 249 Va. 270, 455 S.E. 2d 219 (1995). *Chandler* relied on *Ellison v Commonwealth,* 219 Va. 404, 247 S.E.2d 685 (1978) which holds that the confrontation clause will be satisfied if the following requirements are met:

1. Witness unavailable
2. The statements are against the declarant's penal interest making the statement inherently reliable

When examining Mark Lilly's statements to Investigators Price, Fleet and Hamlin it becomes clear that Mark Lilly was lying to them and attempting to give statements which would serve Mark's own desire to exculpate himself. Especially when it is taken into account that Mark Lilly was told the penalties he was facing and being encouraged by Fleet and Hamlin, on page A.2323 of Mark Lilly's statement to them, not to "take the rap" and that he was not the one who pulled the trigger.

In the first interview conducted by Price, (A.2257) Mark Lilly describes Gary Barker as his "brother's buddy" when in fact Barker and Mark Lilly were living together in a single bedroom mobile home, which they had rented from Alfred Falls. (A.2430, 2433) In addition Mark Lilly contradicts that assertion when he tells Fleet and Hamlin during the second interview, on page 2 of his statement to them (A.2319), that Ben came over to their trailer when Barker and Mark Lilly were still in bed.

Mark Lilly goes on to tell Hamlin that they had been drinking liquor and were drunk before the break-in at Danny Sanders' home, but according to the co-defendants' own statements they didn't have liquor until they

stole it from Sanders' home. The excuse of drunkenness is used throughout the interviews by Mark Lilly to distance himself from criminal activity and lay the blame at the feet of his brother and not the man he is living with. When Mark Lilly is asked where all the liquor came from, he implicates Ben as the sole one who stole it out of Danny Sanders' home. Specifically Price asks, "and when you say 'they got it out of a house', who are you talking about 'they'?" Mark replies "Ben". (A.2258) Price then asks "talking about Ben and who else?" and Mark Lilly then replies "Lilly, just Ben." *Ibid.* Price asks again "Just Ben, or Gary was with them?" Finally Mark Lilly admits "we was all on it." This admission makes it clear that Mark Lilly is trying to shift the blame away from himself and Gary Barker. Further, a reasonable inference can be drawn that Mark Lilly realized that Barker had admitted to Price that "they" had gone into Sanders I home when Price asked Mark Lilly again whether it was "just Ben or was Gary with them." In addition, when Price asks where the Sanders home was, Mark Lilly replies "somewhere in Floyd is all I can tell ya." (A.2258) When Mark Lilly is asked by Hamlin (A.2320) about the whose house was broken into, Mark Lilly denies knowing whose house it was and at first can only "guess" that he went in. According to Sanders, Mark Lilly had been to Sanders' home on several occasions, knew where Sanders' guns were kept and knew that Sanders worked out of town. (A.1626, 1627, 1630) On A.2259, Mark Lilly again gives another self-serving statement when asked by Price what other things were taken out of the Sanders home. Mark Lilly

replies "I don't, I don't really know, you know, everything that was got out cause I was drunk." When questioned further by Price, Mark Lilly gives a detailed account of what was taken. (A.2259-2260) When asked whose residence it was Mark Lilly gave no verbal statement, but according to Price, Mark Lilly indicated that he did not know whose home it was or its location. (A.2289) However, it is clear from Sanders that Mark Lilly had been in Sanders' home on several occasions.

As the questioning turns toward the abduction, robbery and murder Mark Lilly again distances himself from these events. When asked by Price if they all got in Alexander DeFillippis' vehicle, Mark Lilly gives yet another self-serving statement on page A.2263, that he "had to or get left man, I was so drunk." Mark Lilly tells Hamlin on page A.2322 that he didn't get out of the car when DeFillippis was robbed, but when he testified at the sentencing hearing in February of 1997, Mark Lilly admitted that he was the one who robbed DeFillippis. (A.3095, 3099)

When giving statements to Price, on page A.2271, about the time when the murder takes place Mark Lilly states that he nor Barker ever got out of the car. Again a self-serving statement that not only attempts to protect Mark Lilly, but Barker as well. However, it was clear from both the physical evidence and statements by Barker that both Mark Lilly and Barker got out of the car at the scene of the murder. The money clip found on the scene was identified as being the same one taken from Sanders' home and the one that Mark Lilly claimed at residence of Warren Nolan and Patricia Quesenberry. (A.1591-92, 1605) Moreover, Barker stated that Mark Lilly got out of

the car and they laughed at DeFillippis when the victim was stripped.

When asked about the distance that DeFillippis was shot by Ben Lilly, Mark Lilly stated that the distance was ten to fifteen yards on page fifteen of Mark Lilly's statement, while Barker describes the shots as coming from point blank range. Mark Lilly does not mention that he and Barker laughed at the victim when he was stripped down to his underwear, rather Mark Lilly states to Price "I don't know." (A.2268)

When Mark Lilly is asked questions about the robberies that took place immediately after the murder, he cannot remember that Barker had the murder weapon and used it to commit the robbery. When asked about taking a twelve-pack of beer from the first store, Mark Lilly states to Price " . . . I was so drunk, I don't do that shit, you know, if I'm sober." "I had money in my packet." (A.22-73) When asked if he got money from the first robbery Mark Lilly initially states "They got some." Only after subsequent questioning does Mark Lilly admit to Price, *ibid*, that he received a share of the money.

In regard to the second robbery in Giles, Mark Lilly states that "they got their stuff", not that he took his share as Barker suggested. (A.2278)

On page A.2279 in his statement to Price, Mark Lilly denies taking the murder weapon when he fled from the car when police arrived, even though the gun was found in the direction be fled.

However, the most illuminating fact is Mark Lilly's testimony, given under oath, where he admits lying to

Price, Fleet and Hamlin because he was scared when Price started talking about all those life sentences and decided to "(t)hrow it off an somebody else." (A.3096) When asked why he did not testify at Ben's trial Mark Lilly responded "I hadn't been to court yet" and that his " . . . lawyers told me that it was in my best interest to keep my mouth shut, so that's what I did. I took the fifth." (A.3096, 3100)

The appellant argues that Mark Lilly was, at every I opportunity, trying to distance himself from his brother and place himself in the best possible light in order to avoid the life sentences and possible death penalty that Price had mentioned.

When applying the 6th through the 14th Amendments of the United States Constitution to the matter at hand we know that Mark Lilly's statements, besides being contradictory in them elves, more importantly are inconsistent with the facts, the physical evidence, and the other witnesses' statements. One of the confrontation clause's purposes is to allow the defendant to confront his accusers, and to place these accusers under oath. When placed under oath Mark Lilly admitted he lied to the Investigators and refused to testify at the trial in order to protect himself.

Finally, even the trial court had some trouble in determining whether the statements made by Mark Lilly were against his penal interest when it stated that " . . . the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy." (A.2227)

19. Did the trial court err when it refused to grant a mistrial after the Commonwealth's Attorney displayed before the jury a large photograph of the deceased victim, intending to incite or inflame the jury, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1477-1479, 1516-1517)

Not only are prosecuting attorneys under a duty to Prosecute, but they are under a duty to see that the accused gets a fair and impartial trial. *McClane v Commonwealth*, 202 Va. 197, 116 S.E.2d 274 (1960). *Jones v Commonwealth*, 196 Va. 10, 82 S.E.2d 482 (1954), further held that the Commonwealth Attorney should refrain from observations or remarks that evidence feelings of prejudice.

Certainly this rule was not followed in the matter at hand, when a photograph of the victim in life was displayed in front of the jury.

21. Did the trial court err when it allowed, in addition to the testimony of Doctor Oxley, his written report as evidence before the jury, in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1984-1995, 2000)

Some of the tests and reports in this matter were not conducted by Dr. Oxley, and are hearsay. However, the trial court ruled that they were admissible under the business records exception to the hearsay rule. Lilly maintains that this was error an the part of the trial court.

23. Did the trial court err when it refused to declare a mistrial after a co-defendant, (Barker) read an article in the newspaper concerning the trial despite the fact that Barker was sequestered, violating the

Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.1452-1463, 2113-2114)

Early in the trial there was a motion to sequester the witnesses, which the trial court granted. However, in spite of this sequestration order, Barker elected to read newspaper accounts of the ongoing trial in violation of the trial court's order. Appellant maintains that if a sequestration order is to have any validity it must bind the witness to refrain from discussing the case and abstain from reviewing media descriptions of the proceedings. Moreover, sequestering the witness plays an important role in assuring a fair trial to both sides.

24. Did the trial court err when it allowed a police officer (Officer Whitset) to testify concerning statements allegedly made by the defendant before he was Mirandized; in particular, asking the Defendant: "what does a murderer look like?", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.242-278, 361-366, 2197, 2348, 3025-3026)

Officer Whitset asked the defendant, "what does a murderer look like?" The defendant's alleged response was, "me". Clearly, this was an incriminating statement and should have been suppressed. The defendant also stated he was going to hell to meet his brother, which was also in response to a question by the officer.

25. Did the trial court err when it allowed statements allegedly made by the Defendant to Chief Whitset when the officer said he "thought he heard the statement", violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments

in the United States Constitution? (A.247-278, 361-366)

On the night in question Appellant was placed in a patrol car after being taken into custody by officer Randy Tilley. Shortly thereafter Chief Whitset arrived an the scene and positioned himself outside of the vehicle in which Benjamin Lilly had been placed. Whitset admitted that he questioned Lilly about the identity of the others in the car, and whether those who had fled were armed. (A.258-261) Subsequently to this questioning Whitset states that Lilly asked Whitset to "do him a favor." (A.261-262) This "favor" was to put Whitset's shotgun in his mouth and pull the trigger. Whitset refused and stepped back away from the car. (A.274) Then Whitset asked Lilly "what does a murderer look like?" In response Whitset stated that he thought he heard Lilly say "me." (A.268) Whitset admitted that at the preliminary hearing he had "solicited" the question but "wouldn't construe it as being incriminating." (A.268-269) Moreover, Whitset knew at the time of the questioning that multiple armed robberies had taken place when he solicited the question from Lilly. (A.271) Whitset also stated that he had trouble hearing Lilly when he stepped away from the vehicle. (A.260)

The appellant maintains that *Miranda* applies to the matter of whether the statement was admissible against Lilly. There is no doubt that Lilly was in custody during the time that the above stated conversation took place meeting the first requirement of *Miranda*. The next issue is whether the statement was voluntary as the trial court held or whether the response "me" was solicited by the officer as Whitset stated. Whitset admitted on the day of

the motion hearing, as he did at the preliminary hearing, that the response was "solicited" by him. Moreover, when asked on cross-examination Whitset admitted that he had backed away from the vehicle in which Lilly was sitting. (A.274) This statement was not initiated by Lilly, rather it was solicited by Whitset and violates Lilly's rights as guaranteed by the U.S. Constitution specifically his fifth and sixth amendment rights through the fourteenth amendment.

In addition, on December 7, Whitset stated that he thought he heard Lilly say "me". However, when called to testify at the preliminary hearing and at the motion hearing Whitset stated that he was shocked by Lilly's response and the reason he said "thought" was because he only wanted to verify what Lilly had said. However, Whitset admitted that he had trouble hearing Lilly when he was backed away from the car, as he was when this statement was allegedly given. Furthermore, Whitset admitted that his memory was better on December 7 than at the preliminary hearing or at the motions hearing.

The appellant maintains that the trial court erred when it allowed this statement in because it was speculation on Whitset's part, and that its admission was a violation of Lilly's *Miranda* rights. Evidence placed before a jury is not intended to be mere guesswork; rather, Whitset thought he heard Lilly or he didn't. However, when you examine the fact that Whitset asked Lilly what he had said and moved closer to the car a reasonable conclusion can be drawn that Whitset was not certain what Lilly had said.

26. Did the trial court err when it did not allow statements of a co-defendant and one of the Commonwealth's primary witnesses to be admitted, admitting that he had engaged in certain conduct that one could infer that he had the necessary intent to kill the victim, violating the Defendant's rights as guaranteed by the fifth, sixth and fourteenth Amendments in the United States Constitution? (A.2372-2376, 2388)

Approximately five hours prior to the murder, co-defendant Barker made statements about shooting his best friend (A.2400, 2404, 2504-2516) to Joyce Lang. Such statements alarmed her to the extent that she refused to allow her son to go with Barker.

This evidence was favorable to the defendant and Section 8 of the Virginia Constitution, as well as the United States Constitution, allow the defendant to call for evidence in his favor.

Barker had the murder weapon and admitted he possessed the same shortly after the murder. These statements would further advance the Appellant's theory that Barker was the trigger man.

27. Did the trial court err when it failed to give an instruction on intoxication reducing the Capital Murder offense to a lower crime, in violation of the Defendant's rights as guaranteed by the fifth, sixth, eight and fourteenth Amendments in the United States Constitution? (A.2677-2680)

There was more than a small amount of evidence, or "a scintilla" to support this instruction. There was evidence of large amounts of alcohol being consumed, as well as the statement of the Appellant.

28. Did the trial court err when it failed to grant a mistrial after the Commonwealth's Attorney during his closing argument pointed the murder weapon in the direction of the Defendant and his counsel; and when the defense objected to the Court, the Court in front of the jury called the Defendant's objection ridiculous, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2763-2776, 2794-2795, 2801-2805)

During the Commonwealth's closing argument the Commonwealth's Attorney pointed the murder weapon at the defense counsel and/or the defendant; defense counsel objected to said action and requested a mistrial. (A.2763, 2772) The trial court in ruling on the Defendant's motion called the motion "ridiculous" before the jury. (A.2764) This Court held in *Compton v Commonwealth*, 190 Va. 48 (1949) that the "[r]ulings made in words or manner indicating antagonism or resentment toward counsel may convey the impression that the feeling includes also counsel's client." First and foremost, the Appellant argues that objecting to some one pointing a gun in counsel's direction is a natural action and should not be referred as ridiculous. However, the actual harm came from the statement by the trial court. By angrily calling the defense motion ridiculous the trial court gave the jury the impression that it was appropriate to point the gun at the defense, effectively undermining defense counsel's creditability with the jury. Appellant argues that this antagonism was uncalled for, inappropriate and constitutes reversible error. The aforesaid statement of the trial court clearly indicated antagonism or resentment by the trial court which was prejudicial to the defendant. Moreover,

defense counsel requested a corrective instruction in an attempt to lessen the effect of the trial court's statement, but again the trial court refused to grant any corrective instructions to the jury. (A.2774-2777)

29. Did the trial court err at the guilt phase in refusing to give an Instruction that told the jury if they had a reasonable doubt as to the grade of punishment, to impose the lower grade, (life), violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2970)

Although there is little authority on the proffered jury instruction, there is abundant authority in Virginia on closely related matters. A similar instruction has been given involving the grades of the offense. *Sanderson v Commonwealth*, 200 Va. 51, 103 S.E.2d 800 (1958).

30. Did the trial court err when it refused an Instruction telling the jury that they could consider at the penalty stage residual remaining doubt that the defendant committed the offense, violating the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2976-2977)

It is submitted that it was error to refuse this instruction. *Lockhart v. McCree*, 476 U.S. 162 (1986). it is true that the Stockton Case states that this instruction should not have been given, but it is submitted that the Constitution calls for its inclusion.

33. Did the trial court err when it failed to hold Virginia's death penalty statute unconstitutional violating the Defendant's rights as guaranteed by the fifth, sixth, eighth, and fourteenth Amendments in the United States Constitution? (A.359-361)

Appellant concedes that Virginia case law has held that Virginia's death penalty meets all constitutional requirements. However, Appellant argues that the death penalty constitutes cruel and unusual punishment. The Virginia statute is vague in both the "vileness" and "future dangerousness" issues and Appellate [sic] asks this Court to consider additionally the brief filed in the trial court Record and incorporates the same by reference.

34. Did the trial court err when it allowed the Commonwealth to introduce the taped statements of Mark Lilly when the Commonwealth only provided a written transcript of the statement prior to trial, violating the Court's Discovery Order and in violation of the Defendant's rights as guaranteed by the fifth, sixth, and fourteenth Amendments in the United States Constitution? (A.2228-2232, 2250)

Without question the government violated the trial court's discovery order. The defense was not allowed to bear Mark Lilly's devastating taped statements until after the trial began. (A.2228-2232) Although the Commonwealth had provided a written copy of the transcript, it did not provide a copy of the audio tape. However, the trial court's discovery order specifically stated:

> All alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist (in substance or verbatim), including, but not limited to audio tapes, video tapes, film, shorthand notes, print, typing or handwriting. (A.48)

The government violated this discovery order in violation of the defendant's rights.

CONCLUSION

It is submitted that any one, or a combination of the errors assigned, would entitle the Appellant to a retrial in this matter. In addition, Appellant requests to be allowed to present oral arguments in support of this Appellant Brief.

BENJAMIN LILLY

/s/ Max Jenkins by Christopher A. Tuck
By Counsel, Max Jenkins

/s/ Christopher A. Tuck
By Counsel, Christopher A. Tuck

CERTIFICATE OF SERVICE

Max Jenkins
Jenkins & Jenkins
P.O. Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
Attorney & Counselor at Law
P.O. Box 11422
Blacksburg, VA 24062
(540) 552-4567

We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Appellant Brief have been mailed to the Clerk of the Supreme Court of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia

23219, (804) 786-9527; on this 7th day of January, 1998. In addition, Appellant requests to be owed to present oral arguments in support of this Appellant Brief.

/s/ Christopher A. Tuck
Christopher A. Tuck

IN THE
SUPREME COURT OF VIRGINIA

Record Nos. 972385 and 972386

BENJAMIN LEE LILLY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF THE COMMONWEALTH

MARK L. EARLEY
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF THE CASE

Benjamin Lee Lilly was tried by a jury in the Circuit Court of Montgomery County and found guilty on October 25, 1996, of the capital murder of Alexander DeFilippis as well as of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of the illegal use of a firearm.

In a separate sentencing proceeding on October 28, 1996, the jury sentenced Lilly to death for the capital murder on the basis of both "future dangerousness" and "vileness," and to the following sentences for the non-capital offenses: life imprisonment for robbery; life imprisonment for carjacking; ten years for abduction; five years for possession of a firearm by a felon; and 4 terms of three years each for the four convictions of the illegal use of a firearm. After considering a probation report and other evidence presented during the postsentencing hearing held on February 11, 1997, the trial court imposed the sentences which had been fixed by the jury: one death penalty, two life sentences plus 27 years in prison.

Fina! judgment was entered on March 7, 1997. (JA 93). On November 14, 1997, this Court certified the record in the non-capital cases and consolidated it for review with the record of the capital murder case.

QUESTIONS PRESENTED

1. Did the trial court err in refusing to seat potential jurors Huffman, Matheson, Mitchell, Wallace, Jones and Mumaw? (Assign. Error 1, 2, 3, 7, 8, 9).

2. Did the court err in disallowing voir dire questions not on the approved list? (Assign. Error 4).

3. Did the trial court err in qualifying potential jurors Rakes and Shumate? (Assign. Error 5, 6).

4. Did the trial court err in retaining a juror who had read a newspaper article about Lilly? (Assign. Error 16).

5. Did the trial court err in denying the motion for change of venue? (Assign. Error 10).

6. Did the trial court err in disallowing voir dire questions on parole ineligibility? (Assign. Error 11).

7. Did the trial court err in denying the motion for bill of particulars before trial and during the penalty stage? (Assign. Error 12, 31).

8. Did the trial court err in admitting photographs of the victim and a videotape of the crime scene and refusing to use black and white photographs? (Assign. Error 13, 14, 20).

9. Did the trial court err in allowing evidence that there was blood on Lilly's clothing? (Assign. Error 22).

10. Did the trial court err in allowing evidence of Lilly's prior conviction even though Lilly agreed to stipulate to the conviction? (Assign. Error 32).

11. Did the trial court err in allowing evidence of Lilly's refusal to take a paraffin test? (Assign. Error 15).

12. Did the trial court err in allowing Mark Lilly's pretrial statement into evidence? (Assign. Error 17, 18).

13. Did the trial court err in denying the motion for a mistrial based upon the prosecutor's display of a photograph of the victim? (Assign. Error 19).

14. Did the trial court err in allowing the medical examiner's written report into evidence? (Assign. Error 21).

15. Did the trial court err in denying the motion for a mistrial based upon a sequestered witness' reading of a newspaper article about the trial? (Assign. Error 23).

16. Did the trial court err in allowing Officer Whitsett to testify as to Lilly's pretrial statements? (Assign. Error 24, 25).

17. Did the trial court err in sustaining the prosecutor's objection to the introduction of statements made by Gary Barker to Joyce Lang? (Assign. Error 26).

18. Did the trial court err in refusing Lilly's proposed instructions on intoxication, gradation of punishment and residual doubt? (Assign. Error 27, 29, 30).

19. Did the trial court err in denying the motion for a mistrial based upon the prosecutor's pointing the gun at defense counsel during closing argument? (Assign. Error 28).

20. Did the trial court err in refusing to find Virginia's death penalty statutes unconstitutional? (Assign. Error 33).

21. Did the trial court err in allowing taped statements of Mark Lilly when the prosecutor provided only a written transcript of the statements before trial? (Assign. Error 34).

STATEMENT OF FACTS

Sometime on December 4, 1995, twenty-seven-year-old Benjamin Lilly got together with his twenty-year-old brother, Mark Lilly, and Mark's nineteen-year-old roommate, Gary Barker, at the defendant's home in Riner, Virginia, to drink and "smoke a little . . . pot." (JA 2030-2031). Later that night, the three men decided to go to Floyd County to Danny Saunders' home. (JA 2031). The defendant drove them in his Mercury Cougar. (JA 2030). Mark and Gary knew Saunders, had been to his home before and knew that he kept liquor and guns there. (JA 2032).

When they arrived at Saunders' home and found that Saunders was not there, they "decided just to go on in and help ourselves." They "[b]usted out the front glass in the door," went inside and took 9 bottles of liquor and 3 guns. (JA 2033). The guns were a .35-caliber rifle, a 16-

gauge shotgun and a .38 caliber pistol. (JA 2032). Each gun was loaded. They also took a safe. (JA 2034).

They loaded everything into the defendant's car, went to the defendant's sister's home and "busted" open the safe. Inside they found old coins, a money clip, stamps and knives. They split up the loot, began drinking the liquor and then decided to drive to Warren Nolen's home in Radford to see if they could "trade the guns for some dope." Nolen was the defendant's friend. (JA 2035-2037).

Around 7:30 p.m., they arrived at Nolen's home in Radford and displayed their loot to Nolen and his girlfriend, Patricia Quesenberry. (JA 1599-1601, 1586-1588). Patricia knew that Nolen could get into trouble if he was around guns because he was a convicted felon (JA 1589, 1601), so she and Nolen told the defendant and his companions to leave. (JA 1590). The three left after determining that they would be unable to sell or trade the loot because Nolen did not have "enough dope." (JA 2037).

The three men then drove to the trailer in Blacksburg where Mark and Gary rented rooms from "A.J." Fall, and spent the remainder of the night there. (JA 2038). The defendant, Mark and Gary left A.J.'s together on December 5, 1995, at about noon. (JA 2440). They drove the backroads around Shawsville and Elliston, drinking the stolen liquor. They stopped at a small country store, pumped gas for the car and left without paying. (JA 2040). They stopped in a wooded area of Shawsville where Gary fired the rifle and both Mark and the defendant took turns firing the pistol. (JA 2041). They then drove to Alleghany, stopped at a church and Gary and

Mark shot at some geese with the rifle and shotgun. They killed one goose and placed it in the trunk of the car. (JA 2043).

They then drove back to Blacksburg to the trailer park where they tried, unsuccessfully, to sell or trade the guns for "dope." (JA 2044-2046). At about 6:00 p.m., the three drove to a bar in Blacksburg called "Cowboys." They entered the bar where Mark recognized Ron Lucas from his construction job. (JA 1613). Mark asked Ron to go outside, showed Ron the pistol and offered it for sale. Ron asked if it was "hot," meaning stolen, Mark told him it was, and Ron handed it back to Mark. (JA 1614-1615). The defendant and Gary then came outside, Ron went back in the bar and the defendant, Mark and Gary drove away. (JA 1615, 1619).

They drove along Prices Fork Road heading into Blacksburg with the intention of returning to the trailer park to find some "dope." (JA 2049). As they were driving, however, the car's engine quit at the top of a hill and they were forced to coast the car back down the hill to a position on the wrong side of the road and across from a convenience store. (JA 2050-2051). They got out of the car, removed the license plates, liquor and guns, with the intention of "stashing" them in the woods until they could "steal" a car to "get out of there." (JA 2051). Gary had the rifle, Mark had the shotgun and the defendant had the pistol. (JA 2052).

In another part of Blacksburg – College Park – two Virginia Tech students were preparing for their upcoming final exams. Tom Staeger and Alexander DeFilippis had been roommates and friends for four years. Alexander

was twenty-two years old and was majoring in environmental science. (JA 1503-1504). He planned to spend the holidays with his family in this country and in Italy. (JA 1504).

That evening – December 5, 1995 – Tom and Alex left their apartment in College Park in Alex's car at about 7:00 and drove to a friend's to borrow some class notes. (JA 1503-1504). Alex drove his Plymouth K-car. (JA 1508-1509). Alex wore glasses and a watch and carried a wallet with a few dollars in it. (JA 1503-1504). They had planned to copy the notes at a convenience store's copier machine and then go to the school's library to study. (JA 1503). Alex drove them to a convenience store called the "Hethwood Express." (JA 1505).

On their way to the store, Alex hit a curb with his right front tire. (JA 1509). When they arrived at the store, Alex got out to look at his tire while Tom went inside to copy the notes. (JA 1510). That was the last time Tom saw Alex because, when he came out of the store, neither Alex nor his car were there. Tom called their apartment to see if Alex had returned, found out that he had not, and then noticed what looked like an abandoned car across the street. (JA 1506). Tom called "911" and the Blacksburg Police Department responded at about 7:20 p.m. (JA 1507).

When the defendant and his companions abandoned their car across from the convenience store, the defendant told the others to walk into the woods and "he would get us a car." (JA 2052). The defendant walked over to Alex, pointed the pistol at him and told him to give him his money. (JA 2054). Alex handed over his wallet (JA 2055).

The defendant called to Mark and Gary and they all got in Alex's car. (JA 2055-2056). The defendant got in the driver's seat, Gary got in the passenger's seat and Mark got in the back seat. The defendant ordered Alex to sit in the back with Mark. (JA 2054).

The defendant drove off towards Whitethorne, and during the ride Alex told his abductors that he would have given them a ride if they had asked, implored them to take him back to the store to pick up his friend and promised he would take them wherever they needed to go. (JA 2056). The defendant drove across a bridge and onto a deserted stretch of property owned by the Norfolk and Southern Railway Company. (JA 1721, 1764). The defendant stopped the car and Mark and Gary told Alex to close his eyes when they opened the car door to get out so that Alex could not see their faces. Mark had the pistol in his waistband at that time. (JA 2057).

After they all got out of the car, Mark told Alex to start walking and then the defendant ordered Alex to take his clothes off. (JA 2061). The night was cold and windy and it started snowing later. (JA 1734). Alex stripped down to his underwear briefs and socks. (JA 2061). Gary and Mark thought they were going to leave Alex there, forcing him to walk to a phone. (JA 2062-2063). Gary got back into the car in the driver's seat and Mark got in on the passenger's side. (JA 2063). The defendant got into the back seat and demanded that Mark give him the pistol. (JA 2064).

The defendant ran after Alex, who had walked about fifty yards, turned him around and shot him four times with the pistol. (JA 2063-2064). Three of the shots were to

Alex's head: one bullet went straight through the right side of his upper lip; one bullet went into his neck under his left earlobe and out through the back of his neck; one bullet went into his head above the right ear, through his brain and lodged in the left temporal bone. A fourth bullet went straight through his right forearm. (JA 1973-1974). All four shots were fired from a distance of more than two feet. (JA 1974). Alex died shortly after he was shot in his brain. (JA 1976).

With the first shots, Alex threw his arm up in defense and tried to stagger away. (JA 2064). When the fatal shot was fired, Alex fell backwards onto some discarded steel containers. (JA 1722). Alex's eyeglasses were found later at a distance of close to fifty feet away from where he finally fell. (JA 1825). A zigzagging blood trail showed where Alex had staggered before he fell. (JA 1735).

After the shooting, the defendant got into the car and told Gary and Mark that "that boy saw his face" and "I've been in the penitentiary and I ain't going back." (JA 2065). With Gary driving, the three left the area and drove to a store where the defendant bought beer with the money they had taken from Alex. (JA 2066). They then drove to the river and threw away items they believed contained their fingerprints: Alex's clothing and backpack and the plastic cover over the car's speedometer. (JA 2067).

They discussed where to go to hide out and the defendant suggested that they stay with friends of his in West Virginia. (JA 2070-2071). To obtain money for the getaway, they drove to the H&L Market in Eggleston in Giles County to rob it. When they arrived, they argued

over who would carry the gun inside. (JA 2069). The defendant said that he had done "what he had to do already," so Gary carried the pistol inside. (JA 2071). The defendant went in with an eight-inch knife. (JA 2553). They entered the store, held the owners at gun and knife point and robbed them of $425.00 in cash, of food stamps, a radio, beer, tobacco, gloves and sunglasses. (JA 2479-2490, 2547-2556). After the robbery, they drove to a railroad trestle where they counted the money, divided it up and decided it was not enough. (JA 2075).

With Gary driving, they then went to the M&W Market in Pembroke. Gary and Mark went into the store and Gary held the pistol up to the clerk and demanded her money. (JA 2575). The defendant remained in the car. (JA 2076, 2573). The owner, Bill Williams, came into the store and knocked the gun out of Gary's hand, but Gary retrieved it and continued to demand money. (JA 2576-2577). The clerk handed over a money bag filled with change and the robbers left the store. Williams told the clerk to call the police, ran to his car and pursued the three robbers long enough to get their license plate number. (JA 2580). The defendant was driving the car, Mark was in the passenger seat and Gary was in the back seat. (JA 2079). When they saw Williams in pursuit, Gary pointed the rifle out of the window and fired it. (JA 2079-2080). The shot did not result in injury to any person or property. (JA 2586).

Officer Price of the Giles County Sheriffs Department and Officer Tilley of the Pearisburg Police Department each had responded to the scene of the Eggleston robbery and were on their way to the reported second robbery in Pembroke when they came upon the robbers' car headed

towards them. (JA 1648, 1703). The car had stopped due to engine trouble and the defendant, Mark and Gary were attempting to remove the guns, radio, beer and other evidence from the car. (JA 2080-2081). Gary ran a few yards down an embankment and hid with the rifle. (JA 2081). Mark ran away through the woods.

The defendant was apprehended as he got out of the car, armed with the shotgun. (JA 1704-1705). Tilley and Price disarmed the defendant and a search disclosed the knife in his pants pocket. (JA 1649-1650). Upon questioning, the defendant falsely told them that there were three others with assault weapons, that one of them was named Mike Rader and that he (the defendant) was an undercover officer with the Montgomery County Sheriff's Office who had been picked up by the others while he was hitchhiking. (JA 1650-1651).

Several officers arrived at the scene and began to search for the other suspects. The officers heard Gary crying down in a ditch about fifty feet from the car. (JA 1875). Gary was sitting down with the barrel of the rifle up against his head. (JA 1858). The officers talked Gary into surrendering.

The defendant asked the officers if he could use their loudspeaker to talk to his brother and he was allowed to do so. (JA 2186). The defendant called Mark by name, asked him to "come out" and said, "You're not the one that's really in trouble here. You're not the one that's really done anything wrong." (JA 2187).

Chief Gautier of the Pembroke Police Department received a call that a suspect had been seen breaking into a house nearby and walking towards Blacksburg on

Route 460. (JA 1885). The officers found Mark a short time later walking along Route 460. Upon apprehension, he falsely identified himself as Mark Rader. (JA 1886).

The defendant was placed in a police car while the search for the others proceeded. Chief Whitsett of the Pearisburg Police Department was standing guard alongside the car in which the defendant sat. (JA 2194). At that time, the only crimes the police knew about were the two robberies in Eggleston and Pembroke. (JA 2198). The window was down a few inches and the defendant called him over and asked if Whitsett "would do him a special favor." The defendant asked him if he would put the barrel of the officer's shotgun in the defendant's mouth and pull the trigger. (JA 2196). Whitsett told him he could not oblige and asked the defendant "if I [Whitsett] looked like a murderer?" (*Id.*). Then the defendant said something to prompt Whitsett to ask, "What does a murderer look like anyway?" to which the defendant responded, "me." (JA 2197). The defendant then stated that "he was going to hell to meet his brother" who had committed suicide eight years before. (*Id.*).

The defendant was taken to the Giles County Sheriff's Office and was interviewed by Officer Price. The defendant said he was with his younger brother Mark, Gary Barker and one Mike Rader, and that the others had committed the robberies in Eggleston and Pembroke. (JA 1662-1676). He stated that he was forced at gunpoint to participate in the robberies and he made no mention of the larceny of the guns from Danny Saunders' house or the murder and robbery of Alex DeFilippis. (JA 1666, 1674).

After his interview, Price asked the defendant if he would submit to a Gun Shot Residue test. (JA 1678-1679). The defendant declined the request and began to rub his hands together and on his pants legs. (JA 1679, 1926-1927).

Price then interviewed Gary Barker about the robberies. During the interview Price learned from a police dispatcher that the car they had been driving had been reported stolen and its owner abducted. (JA 1680). Price asked Barker about the car and Barker became "very emotional" and said that "a bad thing had happened." (JA 1681). Both Mark and Gary told the police what had happened, including the fact that the defendant had shot and killed Alex. Gary drew a map directing the officers to the location of Alex's body and later went with Officer Fleet of the Montgomery County Sheriffs Office to the area of the New River where they had discarded Alex's clothing. (JA 1771).

The officers also recovered the murder weapon about seventy-five feet away from Alex's car in a ditch. (JA 1907). The day after the murder, a citizen found Alex's wallet about a quarter of a mile from Alex's car in the direction of Pembroke. (JA 1888).

When the defendant was arrested, he had on his person several coins which had been stolen from Saunders' house. (JA 1920). Alex's watch was recovered from the back of Alex's car. (JA 1780). The bullet recovered from Alex's brain was determined to have the same class characteristics as bullets fired from the .38-caliber revolver stolen from Saunders' house. (JA 3523).

A forensic expert determined that there was blood on the bottom right leg of the defendant's blue jeans that

were worn on December 5, but the amount of blood did not permit a DNA test to be performed. (JA 2018-2019). Blood found on Gary Barker's underwear was determined by DNA testing to be his own blood. (JA 2014). No blood was found on Mark Lilly's clothing. (JA 2007).

At trial, Gary Barker testified against the defendant. (JA 2026 et seq.). Mark Lilly was called to testify but refused to do so under the Fifth Amendment. (JA 2243-2244). The trial court found Mark Lilly to be unavailable for purposes of the hearsay exception for declarations against penal interest (JA 2226-2227, 2244-2245) and permitted the Commonwealth to introduce into evidence Mark Lilly's tape-recorded pretrial confessions made to the police. (JA 2253-2282).

The defendant did not testify in his own defense, but rather put on witnesses to say that Gary Barker had a reputation for untruthfulness (JA 2417, 2627), that Gary had made statements to the effect that he would kill his best friend and anyone who tried to arrest him (JA 2525, 2529), and that the defendant was not seen in actual possession of the stolen guns at certain times. (JA 2384, 2435). The jury returned guilty verdicts on all nine charges. (JA 2784-2785).

During the separate sentencing hearing, the Commonwealth presented both record and testimonial evidence of the defendant's extensive criminal history, including over thirty convictions for crimes ranging from public drunkenness to assaults, breaking and entering, larceny and malicious wounding. (JA 2818-2868). The defendant put on a variety of mitigation evidence, including a mental health expert and family members who

described his childhood and abusive father. Dr. Nelson, a forensic psychologist, admitted that he could not say that the defendant never would commit another violent act. (JA 2921-2922). The jury found Lilly a "future danger" and his crime "vile" in that it involved torture, depravity of mind and aggravated battery, and sentenced him to death. (JA 3017).

During the post-sentencing hearing in which the probation officer's report was considered, the defendant presented the testimony of, among others, Mark Lilly. Mark testified that he had lied to his attorneys and to the police and that it was he, rather than his brother, who had ***robbed*** Alex DeFilippis. (JA 3095-3101). Mark denied shooting Alex, however (JA 3098), stated that he did not know who shot Alex and that he could not say that his brother had not shot him. (JA 3102). At the conclusion of the hearing, the trial court sentenced Lilly in accordance with the jury's verdicts.

ARGUMENT

I. ISSUES PREVIOUSLY RESOLVED

A. Bill of Particulars (Assign. Error 12, 31)

Lilly argues, as he did below (JA 296-300), that he was entitled to notice of what evidence the Commonwealth was going to present and what aggravating factors it intended to rely upon. The trial court properly denied the motion. (JA 299-300; Tr. 1498-1499). *See Clazett v. Commonwealth*, 252 Va. 79, 85, 472 S.E.2d 263, 266 (1996), *cert. denied*, 117 S.Ct. 972 (1997).

B. Photographs and Crime Scene Videotape (Assign. Error 13, 14, 20)

The trial court reviewed the Commonwealth's photographs of the victim as well as the videotape of the crime scene. (JA 313-318). The court excluded the autopsy photographs but admitted the other photographs and videotape into evidence. (JA 320-323). The court's ruling was a proper exercise of its discretion. *See Clagett*, 252 Va. at 86-87, 472 S.E.2d at 267.

C. Constitutionality of Death Penalty Statutes (Assign. Error 33)

Lilly argues that the death penalty is cruel and unusual punishment and that Virginia's aggravating factors are vague. These issues properly were rejected by the trial court. (JA 360). *See Mickens v. Commonwealth*, 252 Va. 315, 320, 478 S.E.2d 302, 305 (1996), *cert. denied*, 117 S.Ct. 2442 (1997).

Lilly also asks this Court to consider other arguments made below but not briefed on appeal. (Def. Br. at 45). This Court expressly should find that the arguments not briefed have been waived in this appeal. *See Williams v. Commonwealth*, 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994) (rejection of attempt to "incorporate by reference" arguments made in trial court), *cert. denied*, 515 U.S. 1161 (1995); *accord Mickens v. Commonwealth*, 247 Va. 395, 401 n.4, 442 S.E.2d 678, 683 n.4, *rev'd on other grounds*, 249 Va. 423, 457 S.E.2d 9 (1995); *Jenkins v. Commonwealth*, 244 Va. 445, 460-461, 423 S.E.2d 360, 370 (1992), *cert. denied*, 507 U.S. 1036 (1993).

II. PRETRIAL RULINGS

A. Jury Selection

1. The Trial Court Did Not Abuse Its Discretion In Striking Six Jurors For Cause. (Assign. Error 1, 2, 3, 7, 8, 9)

Lilly argues that the court erred when it struck potential jurors Huffman, Matheson, Mitchell, Wallace, Ollie Jones and Mumaw due to their views opposing the death penalty. Lilly "concedes" that Matheson, Wallace and Mumaw expressed opinions that they could not impose the death penalty, but contends nevertheless that he was "entitled to a jury of his peers." (Def. Br. at 12-13). Lilly's concession is dispositive of the issue with respect to those three veniremen. While the law generally entitles an accused to a jury of his peers, the law does not entitle him to a juror whose views about the death penalty would substantially impair or prevent the performance of his duties in accordance with his oath and the court's instructions. *Barnabei v. Commonwealth*, 252 Va. 161, 173, 477 S.E.2d 270, 277 (1996) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)), *cert. denied*, 117 S.Ct. 1724 (1997). It being undisputed that Matheson, Wallace and Mumaw could not impose the death penalty under any circumstances, they were not qualified as a matter of law to sit on the jury.[1]

---

[1] Matheson said her opposition to the death penalty would prevent her even from ***convicting*** someone of capital murder and that she probably would not consider the death penalty under any circumstances. (JA 721). Wallace said she would choose her strong beliefs against the death penalty over the instructions of the court. (JA 1045). Mumaw said she could not

Lilly's argument with respect to Huffman, Mitchell and Jones also does not demonstrate an abuse of discretion. In *Barnabei*, this Court repeated its settled standard that a ruling to exclude a prospective juror will not be disturbed on appeal unless it constitutes manifest error. 252 Va. at 173, 477 S.E.2d at 277 (citing *Yeatts v. Commonwealth*, 242 Va. 121, 134, 410 S.E.2d 254, 262 (1991), *cert. denied*, 503 U.S. 946 (1992)). The deference due the trial court is based upon the fact that the trial judge sees and hears the prospective jurors and thus is in the best position to determine whether their views would substantially impair or prevent the performance of their duties. *See Barnabei*, 252 Va. at 173, 477 S.E.2d at 277 (citing *Weeks v. Commonwealth*, 248 Va. 460, 475, 450 S.E.2d 379, 389 (1994), *cert. denied*, 116 S.Ct. 100 (1995)).

Huffman stated unequivocally "I don't believe in the death penalty," and that she would "have a problem" considering its imposition. (JA 513). Then, when she immediately answered a question in a contrary manner, the court stated, "in my mind [that] conflicts with what you said earlier. . . . " (*Id.*). Later, when Huffman still seemed to give conflicting answers, or ones that indicated she did not understand the questions, the court questioned her further:

> THE COURT: . . . does your belief prevent you from imposing the death penalty after you hear all the evidence, or do you feel that your opinion or your belief about the death penalty would in fact impair your ability to resolve that issue

---

put aside her anti-death penalty views in deciding an appropriate punishment. (JA 1361).

> fairly for both the Commonwealth and the defense. In other words, are you hesitant to impose the death penalty regardless of what the evidence shows you, knowing that you have a lesser punishment which may be available.
>
> MS. HUFFMAN: Right.
>
> THE COURT: Now, do you understand my question?
>
> MS. HUFFMAN: Yes, I understand what you are saying now.
>
> THE COURT: You would find it very difficult?
>
> MS. HUFFMAN: Yes.
>
> THE COURT: Regardless of the evidence?
>
> MS. HUFFMAN: Right.
>
> THE COURT: To impose the death penalty?
>
> MS. HUFFMAN: That's correct.
>
> THE COURT: You could under certain circumstances, but in your heart of hearts you are opposed to the imposition of the death penalty?
>
> MS. HUFFMAN: That's correct.

(JA 525-526).

When the Commonwealth challenged Huffman, the court found that "her opinion or her belief as to the imposition of the death penalty would prevent a fair and impartial hearing in this matter, so I would excuse her for cause. . . . " (JA 544-545). The trial court's finding is fully supported by the record; therefore, Lilly has demonstrated no abuse of discretion in the court's ruling.

Mitchell stated that she had "struggled" with the question of the appropriateness of the death penalty (JA 786), that she could not consider the death penalty because, "religiously I have a hard time with being in a position of taking someone's life." (JA 790). She also stated that, due to her doubts about the issue, she would prefer not to sit on the jury. (JA 801). Finally, the court questioned her about whether her views would impair the performance of her responsibilities and she said they would not. (JA 810). When challenged by the Commonwealth, the court found as follows:

> THE COURT: . . . Gentlemen, I'm frankly concerned about Ms. Mitchell's ability to serve on this jury. I feel she's been very honest in all the questions that have been asked of her, and my opinion she is no doubt wrestling at this point with her feelings as to whether she can impose a death penalty. I interpret some of her answers to indicate that she would not be biased against the imposition of the death penalty in all cases, and she has made statements to that effect. At the same time she has made statements that I interpret that she does not really know what her feelings are at this time as it relates to the death penalty, and I do not think this case should provide her with a laboratory to work through her feelings. I think that is bias to the Commonwealth . . . . when I consider all the answers that she has given to all the questions I would dismiss her for cause.

(JA 811-812). The court's determination that Mitchell had not firmly decided whether or not her anti-death penalty views would substantially impair the performance of her duties is supported by the record. The judge's decision,

based upon what he saw and heard, was a proper exercise of his discretion. *See Spencer v. Commonwealth*, 240 Va. 78, 94, 393 S.E.2d 609, 618 ("The record gives every indication that the trial judge gave close and conscientious attention to the demeanor of the veniremen"), *cert. denied*, 498 U.S. 908 (1990).

Finally, Jones' responses also fully supported the trial court's decision to strike her for cause. Initially, Jones said that, after talking to her minister, she felt she could impose a death sentence. (JA 1340). But increasingly, her responses became more equivocal. (JA 1342: "I think so;" 1343: "I guess"). Then, admitting she had "been under a lot of stress at home" (JA 1343), she stated that she could not be sure whether she could affirm a death penalty due to her religious beliefs. (JA 1348). When challenged by the Commonwealth, the trial court found that "she's very troubled about the possibility of imposing the death penalty" and "I do not feel that she is free of any bias." (JA 1349). Again, these findings by a judge who assessed the demeanor of the juror are supported by the record and well within his discretion to make.

Lilly has failed to demonstrate any manifest error flowing from the trial court's carefully considered rulings regarding these potential jurors. Under Barnabei his claims of error should be rejected.

2. The Trial Court Did Not Abuse Its Discretion By Refusing To Allow Some Questions Which Were Not on the Approved List. (Assign. Error 4)

Lilly argues in conclusory fashion that error occurred when the trial court disallowed voir dire questions that were not on the pre-approved list of questions. Lilly identifies no such instances much less how he was prejudiced. In fact, with few exceptions, both the defense and prosecution agreed what questions would be asked during the selection of Lilly's jury. (JA 365-373).

Before trial, the court had granted Lilly's motion to send out a questionnaire to all prospective jurors that asked for a wide range of information about each one. (JA 3229-3233, 3313). During the voir dire proceedings, the trial court allowed a wide range of questions to be asked. The few times the court cautioned the defense to stay within the approved list of questions simply did not demonstrate any error or abuse of discretion. (JA 917-918).

In *Goins v. Commonwealth*, 251 Va. 442, 457, 470 S.E.2d 114, 124-125, *cert. denied*, 117 S.Ct. 222 (1996), this Court rejected the defendant's claim that the trial court erred when it refused to ask certain questions the defendant had included in a prepared list of voir dire questions. This Court held that as long as the parties can ask questions relevant to the statutory factors defined in Virginia Code § 8.01-358 – relationship, interest, opinion or bias – then the denial of a request to extend the questioning beyond those factors is not error. *See also LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653

(defendant has no right to extend voir dire *"ad infinitum"*), *cert. denied*, 464 U.S. 1063 (1984).

Lilly was not hampered in any way from asking probing questions regarding the statutory factors. The trial court's ruling regarding the issue demonstrates a proper exercise of discretion:

> I know it's a critical case and because I knew it was a critical case I had both the Commonwealth and the defense submit their proposed voir dire questions prior to trial so that the Court in conjunction with the attorneys could review those questions and we did so prior to the commencement of this case and as a result of our meeting together certain questions were found to be improper from both sides. All counsel agreed to that and those questions were omitted, and the other benefit of that is that each side have the benefit prior to trial of knowing what the other attorney will ask on voir dire, and I am not going to go beyond those questions except if a response requires a clarification, and if a response requires a clarification I will let you ask that.

(JA 917-918). Lilly's claim of error simply is foreclosed by the holding in *Goins*.

3. The Trial Court Did Not Abuse Its Discretion By Retaining Jurors Rakes and Shumate. (Assign. Error 5, 6)

Lilly argues that potential juror Rakes was biased against him because he was friends with Chief Whitsett, a Commonwealth's witness, and because he initially stated that he would find Whitsett more credible than a

stranger. (JA 988). However, when the trial judge asked Rakes if he would "automatically give a higher credibility" to the witness, Rakes answered, "I'm not sure that's exactly what I meant." (JA 996). The judge then explained that every witness would be sworn to tell the truth and Rakes explained what he had meant by his initial response:

> I think what I meant was I'd probably start at a different point because you do have some familiarity, some knowledge and some past about the person, maybe you would start with a different feeling when you first began, but I don't know that that would carry on through all the testimony.

(JA 997). The judge asked Rakes the following question:

> If every person who testified before you took an oath to tell the truth could you from that point on weigh every testimony of every witness on the same plane when that witness comes in here . . . would you accept each witness once they take their oath as being on an equal plane with every other witness?

(*Id.*). Rakes answered, "Yes, Your Honor, I would." (*Id.*). When the defendant challenged Rakes, the trial court made the following findings:

> . . . after hearing all the responses by Mr. Rakes of these questions I had the initial concern that you have expressed. That's why I asked him an additional several questions. Once I brought up the topic Mr. Rakes immediately said well I'm glad you brought that up because I somewhat misunderstood the question, and after he explained to me and to you all and in response

> to the additional questions that I asked him I am convinced that he could be completely unbiased in this matter and accept the testimony of all the witnesses once they are put under oath as in an even plane you know once the testify, so for that reason I would seat Mr. Rakes.

(JA 999).

In *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 510 U.S. 848 (1993), this Court held that "we defer to the trial court's decision to exclude or retain prospective jurors because the trial judge has seen and heard each member of the venire, and is in a better position than this Court to decide whether something will prevent or substantially impair a particular person's performance of his or her duties as a juror." *See also Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990)), *cert. denied*, 502 U.S. 824 (1991). Stewart, like Lilly, complained that a juror should have been struck who initially stated she would give more weight to a police officer's testimony. *Stewart*, 245 Va. at 235, 427 S.E.2d at 402. Considering the juror's later answers, however, it was clear that the juror was not disqualified to sit and the trial court's decision to retain her demonstrated no manifest error. *Id.*

Rakes swore that he could consider all witnesses equally and the trial court found that his later answers satisfied the court's early concerns. Under *Stewart*, the court did not abuse its discretion.

Lilly also faults the trial court for retaining prospective juror Shumate because he was the second cousin of Investigator Hamblin, one of the Commonwealth's witnesses. Shumate, however, affirmatively and repeatedly

stated that he would not necessarily believe Hamblin over another witness and that their relationship would make "no difference at all." (JA 1016-1018). The trial judge stated that he "detect[ed] absolutely no trace of a bias" in Shumate and, therefore, denied the motion to strike him. (JA 1019). The record, of course, wholly supports the trial court's finding and, under *Eaton*, that finding must be given deference.[2]

4. The Claim That the Trial Court Erred In Retaining A Juror Who Had Read About The Case Is Procedurally Barred. (Assign. Error 16)

Lilly argues that an unidentified juror who read a certain newspaper article about the case should have been disqualified because the article contained information about Lilly's parole status at the time of the murder. Before the voir dire proceeding began, Lilly brought to the court's attention a newspaper article in that day's paper (October 15, 1996) that, according to him, contained references to statements of Mark Lilly that were the subject of a motion to suppress. (JA 405). Lilly asked the court to disqualify any juror who had read the article. (*Id.*). The trial judge denied the motion, but ruled that

---

[2] The defendant's implication that Shumate's second-cousin relationship to Hamblin somehow disqualified him is without any authority. Section 8.01-358 allows a challenge to a juror who is related to a ***party*** or to the ***victim***. *See Salina v. Commonwealth*, 217 Va. 92, 94, 225 S.E.2d 199, 200 (1976). Relation to a witness, in itself, is not grounds for exclusion.

Lilly could examine each juror about what he or she had read. (JA 406-407).

Each prospective juror was questioned individually about what he knew, or had heard or read, about the case. Of the twenty-four jurors qualified for the final panel, only twelve had even heard about the case through the media and nine of those had not read or heard about the case since the crime had occurred a year before trial.[3] Each of the qualified jurors who knew anything about the case from outside sources affirmed that what he had seen, heard or read would have no effect on his ability to sit as an impartial juror. (See note 3 above).

The ***only*** prospective qualified juror who said he had read a newspaper article about the case on the first day of jury selection was juror McGuyer.[4] McGuyer swore that what he had read would not affect his ability to sit impartially (JA 755) and further that he could not even remember any specific details of what he had read about the previous day. (JA 773).

Lilly did not renew his motion after the voir dire proceedings had concluded. However, after the final jury

---

[3] The qualified jurors who had obtained information from some media source about the case were Bukowski (JA 419-420); Hyer (JA 547-548, 568-571); McGuyer (JA 772-773); Patty (JA 866); Page (JA 951-952); Rakes (JA 972); Dixon (JA 1125-1126); Gross (JA 1282-1283), and Prosser (JA 1363-1364). Of those, the ones who had not read or seen anything recent on the case were Bukowski, Jones, Lester, Loveday, Page, Rakes, Dixon Gross and Prosser.

[4] The record does not show what article McGuyer read or if it was the article about which Lilly complained on October 15, 1996.

of twelve jurors plus two alternates had been selected, the trial court made the following ruling:

> That completes every motion that I'm aware of except for the motion made by [defense counsel] on Tuesday in which he asked the Court to essentially dismiss the people who had been called in because they were tainted if they had read the Tuesday morning edition of THE ROANOKE TIMES and I believe the record will reflect I took your motion under advisement . . . . [u]ntil the voir dire had been completed and if I recall correctly, I believe there was only one person who was voir dired that had read the article and after listening to her testimony very carefully, I do not feel in anyway that reading that article tainted her view and that she is unbiased and what she read did not affect her impartiality in this case.

(JA 1440-1441).

Lilly now is arguing that an unnamed juror should have been disqualified because he or she was exposed to information in the article about Lilly's prior criminal record, but in the court below his argument was based upon an alleged exposure to his brother Mark's confession. Thus, to the extent Lilly's appellate argument is different from his argument made below, it may not now be considered. *See* Rule 5:25, Rules of the Supreme Court of Virginia. Furthermore, because Lilly did not challenge any qualified juror on the basis of improper exposure to the October 15 article, he has waived his current argument that any such juror should have been disqualified. *See Spencer v. Commonwealth*, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989), *cert. denied*, 493 U.S. 1093 (1990). And,

even if the claim with respect to juror McGuyer had been preserved, it could not result in reversal because McGuyer was an alternate juror who did not participate in the jury's deliberations or decision. Lilly, therefore, could have suffered no harm from his qualification. *See Gray v. Commonwealth*, 233 Va. 313, 339, 356 S.E.2d 157, 171, *cert. denied*, 484 U.S. 873 (1987).

Of course, the claim of error also has no merit because, as discussed above, this Court has held it to be settled law that a trial judge can best determine whether a juror is qualified and free from bias. *See, e.g., Stewart*, 245 Va. at 234, 427 S.E.2d at 402. Here, there can be no question about the propriety of the court's ruling because every qualified juror swore unequivocally that nothing he had heard or read had any effect on his ability to sit impartially. Lilly presents nothing to show that that ruling constitutes "manifest error."

5. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Change of Venue (Assign. Error 10)

Lilly argues, as he did below, that a change of venue was necessary because of pretrial publicity. The trial court took the motion under advisement and, after twenty-four qualified jurors were chosen, overruled it. (JA 207, 1411). The court found as follows:

> . . . we have been able to seat a panel that is completely free of bias, and for that reason I would at this point overrule your motion.

(JA 1411). Defense counsel responded that he did not "necessarily disagree" with the court's finding of lack of

bias, but noted that "every single one of these 24 people" had heard about the case. (*Id.*).

The standard, of course, is not whether jurors have heard about the case, but rather whether the defendant has overcome the presumption that he can receive a fair trial in the jurisdiction where the offense occurred by demonstrating that the "citizens of the jurisdiction feel such prejudice against the defendant as is reasonably certain to prevent a fair trial." *Roach v. Commonwealth*, 251 Va. 324, 342, 468 S.E.2d 98, 108-109, *cert. denied*, 117 S.Ct. 365 (1996). The decision whether to change venue lies within the sound discretion of the trial court, a decision influenced by the amount of difficulty encountered in selecting a jury. *Id.*

Defense counsel also was wrong in his rendition of the facts. The record shows that, until trial, eleven of the final twenty-four jurors had heard ***nothing*** about the case or Lilly. (JA 896, 922, 1001, 1021-1022, 1051, 1074-1075, 1093, 1155, 1183-1184, 1319, 1396). Out of forty-three prospective jurors, ten were struck for cause for reasons unrelated to what they had read or heard about the case. (JA 475, 544, 723, 811-812, 861, 1046, 1273 and 1298, 1349, 1355-1356, 1362). Thus, out of a total of forty-three persons, only nine persons, or one-fifth of the total number called, were excluded due to what they had read or heard. The relative ease with which the court was able to impanel a jury "completely free" from any bias demonstrates that the court did not abuse its discretion in denying the motion to change venue. *See Roach*, 251 Va. at 342-343, 468 S.E.2d at 109.

6. The Trial Court Properly Denied Voir Dire Questions About Parole Eligibility. (Assign. Error 11)

Lilly argues, as he did below, that he had a Fifth and Sixth Amendment right under *Simmons v. South Carolina*, 512 U.S. 154 (1994), to "question or educate" the potential jurors about parole. (JA 12-13). The trial court properly denied the motion. (JA 232-233).

Simmons held that due process requires that the defendant in a "future dangerousness" capital murder case be allowed to tell the sentencing jury, ***by argument or instruction***, that he will be ineligible for parole if sentenced to life and if state law requires such ineligibility. 512 U.S. at 177 (O'Connor, J. concurring). *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (in plurality opinion, fifth concurring vote on grounds narrower than plurality becomes controlling opinion). Simmons involved only the Fourteenth Amendment due process right of rebuttal during sentencing; it had nothing whatsoever to do with the Sixth Amendment right to a fair trial or jury. The trial court thus properly found that Simmons did not apply. (JA 233).[5]

---

[5] Of course, the trial court not only gave the sentencing jury a proper *Simmons* ***instruction*** (JA 77ZZ), but also allowed extensive ***argument*** to be presented to the jury on the subject of Lilly's possible parole ineligibility. (JA 3002-3005, 3008-3009, 3012, 3014).

B. Other Rulings

1. The Trial Court Properly Admitted Testimony Describing Lilly's Behavior When Asked to Take a "Paraffin" Test (Assign. Error 15)

Lilly argues that the trial court erred in admitting the testimony of Officers Price and Skidmore in which they described Lilly's reaction to the officer's request that he submit to a Gun Shot Residue (GSR), or "paraffin," test. According to *Lilly*, the officers never should have given him a choice in the matter in the first place, thereby making it somehow "unfair" to use his response against him. Lilly cites *Escobedo v. Illinois*, 378 U.S. 478 (1964), as his only authority, but *Escobedo* is inapposite. *Escobedo* stands for the general proposition that unwarned pretrial statements taken during police interrogation are inadmissible at trial, but no such circumstances existed in Lilly's case. Lilly erroneously states that *Escobedo* stands for the principle that an accused's silence may not be used against him at trial. (Def. Br. at 27).

That principle, enunciated in *Doyle v. Ohio*, 426 U.S. 610 (1976), also is inapplicable here.

The trial court held that the officer's giving Lilly a choice whether to submit to a paraffin test "is not a violation of any constitutional right afforded to the defendant." (JA 1438). That ruling was correct. The prohibition against using an accused's silence against him, identified in *Doyle* as Fifth Amendment error, expressly has been held inapplicable to situations analogous to the refusal to take a paraffin test. In *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), the Supreme Court held that a refusal to

take a blood-alcohol test, after an officer has requested it, "is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."

Here, Lilly was given the *Miranda* warnings and waived his right to remain silent. (JA 334). He was interviewed for twenty-two minutes and the interview was tape-recorded. (JA 338). Deputy Price asked him if he would submit to a Gun Shot Residue test and Lilly refused. (JA 339-340). Lilly immediately began to rub his hands together, an act that, in the deputy's opinion, eliminated the likelihood of obtaining residue evidence. (JA 341, 347).

In response to Lilly's motion to suppress this evidence on the basis of a *Miranda* violation (JA 349-351), the prosecutor properly argued as follows:

> This does not have to do with whether he refused the test. The question is, what were his actions after he refused the test? And are those actions relevant to the case and for something that Mr. Lilly may have know [sic] or desired not to have known. I don't care if we say he said no. . . . He was asked and he began rubbing his hands. That's what the Commonwealth believes is admissible. It's, it has nothing to do with Miranda. Miranda has never been held to say whatever you say or do may be held against you. Only interrogation. He was not interrogated about his hands. He was simply asked, would you consent to a test? Nor, is it a violation of the Fifth Amendment because he was not compelled to do anything, nor was it testimonial. He was rubbing his hands.

(JA 355). The trial court found no law to support Lilly's request for suppression. The court denied the motion, but ruled that Lilly would be permitted to cross-examine the officer about the matter. (JA 1439).

During the trial, Deputy Price testified that he had given Lilly the *Miranda* warnings and had taken his statement. He then asked Lilly if he had fired a weapon and Lilly said he had not. (JA 1676). Price therefore asked Lilly if he would take the GSR test, after which Lilly began to nib his hands together. (JA 1678-1679). On cross-examination, Price acknowledged that he could have obtained a search warrant to require Lilly to submit to the test and that he did not have to give Lilly any option in the matter. (JA 1689). At no point in Price's testimony before the jury was Lilly's refusal to take the test mentioned.

Officer Skidmore also testified before the jury that he observed Deputy Price ask the defendant to take the GSR test. When the prosecutor asked him how Lilly "physically" reacted, Skidmore said, "[h]e, ah, declined the test and started rubbing his hands together. . . . " (JA 1927). The defendant made no objection to this testimony but thoroughly cross-examined Skidmore about what Deputy Price had said to Lilly. (JA 1928-1937).

Clearly, this record demonstrates that, as the trial court found, there was no error. Lilly was given *Miranda* warnings and waived them. He voluntarily answered the officer's questions. His physical reaction to the request that he take the GSR test was observed by two officers. No constitutional rule prevented the officer from asking Lilly to submit to the test or from testifying about Lilly's

reaction. The testimony properly was admitted into evidence and the defendant properly was allowed, through cross-examination, to inform the jury that the officer need not have given Lilly any choice in the matter. The jury thus could afford the testimony whatever weight it deemed appropriate.

2. The Trial Court Properly Admitted Into Evidence The Pretrial Statements Of Mark Lilly. (Assign. Error 17, 18).

Lilly's argument is essentially that the trial court erred in admitting the hearsay evidence of Mark Lilly's pretrial statements as declarations against penal interest because (a) *Chandler v. Commonwealth*,[6] was decided wrongly and (b) Mark Lilly supposedly lied in his pretrial statements. Neither argument has merit.

a. Chandler does not conflict with the Confrontation Clause.

According to Lilly, the rule in *Chandler* – that a declaration against penal interest may be admitted into evidence against a criminal defendant as an exception to the hearsay rule – violates the Confrontation Clause of the Sixth Amendment. Lilly implicitly calls for the overturning of *Chandler* on this ground, but yet offers no analysis or authority other than his observation that until *Chandler* was decided, no Virginia decision apparently had applied

---

[6] 249 Va. 270, 455 S.E.2d 219, *cert. denied*, 516 U.S. 889 (1995).

the hearsay exception for declarations against penal interest in cases where the declarations were admitted into evidence ***against*** a criminal defendant. This observation, however, hardly supplies a reason to overturn *Chandler* much less to find a confrontation violation.

The exception for declarations against penal interest has been firmly rooted in Virginia law since 1923. *See Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978) (citing *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923)). In Hines and the cases that followed, it happened to be the criminal defendant who claimed the right to present the hearsay. It does not follow, however, that the hearsay exception is permitted only when sought by the defendant, or even that the exception should be permitted only when sought by the defendant. The most that can be gleaned from the case history in Virginia is that, until *Chandler* the issue never had come up for review in a case where the prosecutor sought the introduction of evidence under the hearsay exception.

Of course, no Virginia case supports Lilly's remarkable proposition that the exception is available only for the defendant and, indeed, *Chandler* expressly held that the rule in *Ellison* and *Hines* applied to declarations against penal interest which were offered by the Commonwealth as evidence against a criminal defendant. *Chandler*, 249 Va. at 279, 455 S.E.2d at 224-225. *Chandler* made no distinction, for purposes of applying the hearsay exception, between cases where the defendant asked for the exception and cases where the Commonwealth asked for it. Moreover, although Chandler did not raise, and consequently this Court did not address, any confrontation issue, no court has held, as Lilly now apparently

proposes, that the Confrontation Clause absolutely prohibits declarations against penal interest from being introduced against a criminal defendant.

Moreover, evidence submitted by the prosecution under this exception routinely has been found to satisfy confrontation concerns. *See, e.g., United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir. 1995); *United States v. York*, 933 F.2d 1343, 1362 (7th Cir.), *cert. denied*, 502 U.S. 916 (1991); *United States v. Workman*, 860 F.2d 140, 141 (4th Cir. 1988); *United States v. Smith*, 792 F.2d 441, 443 (4th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *United States v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978). *See also Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 2437 (1994) (regarding this hearsay exception, Court held "that the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause.").[7]

---

[7] Lilly attempts to distance his case from *Chandler* by contending that he not only was faced unfairly with Mark's out-of-court statements, but also with the interrogating officer's statements which, according to Lilly, were proclamations of Mark's truthfulness. The problem with this argument is twofold. First, Lilly was not hampered in any way from cross-examining the interrogators (Price, Hamlin and Fleet) because they all appeared as witnesses at trial. Lilly thus suffered no lack of confrontation with respect to them. Second, the recorded interviews with Mark Lilly do not support the charge that the officers vouched in any way for Mark's credibility. The most that can be said about their part in the recorded sessions is that they were ***encouraging*** Mark to tell the truth.

b. *The Confrontation Clause did not prohibit the admission of Mark Lilly's statements.*

When evidence is admitted under a "firmly rooted" hearsay exception, a court can "infer[] without more" that it is sufficiently reliable to satisfy the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The exception for declarations against penal interest is just such a "firmly rooted" exception. *See York*, 933 F.2d at 1363 (exception "well-rooted" for confrontation purposes); *Workman* 860 F.2d at 141 ("firmly rooted hearsay exception"); *Raia v. Commonwealth*, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996) (exception "firmly rooted" in Virginia).

However, even when hearsay does not fall within a "firmly rooted" exception, its admission into evidence does not violate the Confrontation Clause "if the prosecution establishes that the declarant is unavailable and that the evidence bears 'indicia of reliability' sufficient 'to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Shaw*, 69 F.3d at 1253, *quoting Ohio v. Roberts*, 448 U.S. at 65-66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)) (internal quotation marks omitted). The Confrontation Clause's requirement of "reliability" is the same as the "reliability" required under Virginia law for admission of declarations against penal interest. *See Chandler*, 249 Va. at 279, 455 S.E.2d at 224, *citing Ellison* 219 Va. at 408-409, 247 S.E.2d at 688; *see also York*, 933 F.2d at 1361 (regarding the "reliability" required under the Federal Rules of Evidence and the "reliability" required under the Confrontation Clause,

"[t]here seems little reason to treat the requirement . . . differently in each context"). The trial court here properly found that Mark Lilly's statements met both of these Confrontation Clause concerns.

The trial court found that the statements of Mark Lilly qualified under the exception for declarations against penal interest because Mark was unavailable as a witness[8] and because his pretrial statements clearly were made with the knowledge that he was implicating himself in the crimes. (JA 2226-2227, 2244-2245). The court found the statements reliable and trustworthy based upon "the evidence and exhibits . . . the facts and circumstances" and the existence of a "substantial link" to connect Mark to the crimes other than his statements. (JA 2227). The court also found that the statements did not violate the Confrontation Clause because they were admitted under a "firmly rooted" exception to the hearsay rule. (*Id.*).[9]

---

[8] The Commonwealth called Mark Lilly to the stand and he refused to testify under the Fifth Amendment. (JA 2243-2244). The defendant does not contest Mark Lilly's unavailability.

[9] The defendant disingenuously contends that "even the trial court had some trouble in determining whether the statements . . . were against his penal interest when it stated that '. . . the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy.' " (Def. Br. at 38, quoting JA 2227). Obviously, the word "weren't" is either an error on the part of the court reporter or an inadvertent slip of the tongue by the judge, as is evidenced by the court's statement made only a moment before the quoted language, that the exception was for declarations against penal interest, as well as by the fact that Lilly reargued his motion at least ***four*** more times before judgment was entered (JA

The determination of whether a statement against penal interest is reliable lies within "the sound discretion of the trial court, to be determined upon the facts and circumstances of each case." *Ellison*, 219 Va. at 408, 247 S.E.2d at 688; *see also Workman*, 860 F.2d at 144 (in federal court, "[t]he finding of the trial judge on the guarantees of trustworthiness [of the declaration against interest] are subject to the clearly erroneous standard of review"). The trial court's ruling admitting Mark Lilly's statements in this case clearly was not an abuse of discretion.

First, Mark Lilly's pretrial statements qualified under Virginia's three requirements for admission into evidence. *See Morris v. Commonwealth*, 229 Va. 145, 147, 326 S.E.2d 693, 694 (1985) (unavailable witness, self-inculpatory and reliable statement). Mark Lilly invoked his Fifth Amendment right to remain silent and, therefore, was "unavailable" for purposes of the exception. *See Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950). Lilly's statements given to Officers Price, Hamlin and Fleet obviously subjected him to criminal liability and, therefore, were against his penal interest. (JA 2253-2282, 2318-2332). Indeed, the officers expressly warned him before each statement that what he said would be used against him if charges were brought. (JA 2255, 2318). Mark not only admitted that he participated in the Saunders break-in, that he went along with Alex's abduction, witnessed the murder and participated in the subsequent two "getaway" robberies, but he also told the

---

2348-2357, 2636-2639, 3022-3025, 3050-3051, 3071-3083) and ***not once*** did he call into question, or rely on, the alleged language attributed to the court at JA 2227.

officers that he knew his statements to them would result in charges of robbery and murder. (JA 2281, 2324). There can be no question about the fact that Mark Lilly knew his statements were against his penal interest."[10]

---

[10] Lilly contends that Mark made statements which were internally inconsistent or contradictory to Gary Barker's testimony on essentially minor points. His complaints, however, are all matters which could have been, and in many instances were, pointed out to the jury. (JA 2734-2737, 2746, 2748). The hearsay that may be admitted without violating the defendant's Confrontation Clause rights is that which is sufficient "to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Ohio v. Roberts*, 448 U.S. at 65-66. Lilly's jury had a sufficient basis upon which to determine whether Mark was telling the truth. The statements, therefore, met the threshold "reliability" precondition to admission into evidence. *See Shaw*, 69 F.3d at 1253 ("this trustworthiness requirement – which serves as a surrogate for the defendant's in-court cross-examination – is satisfied if the court can conclude that cross-examination would be of 'marginal utility' " (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)). Furthermore, Lilly's reliance on Mark's post-sentencing hearing testimony in which Mark said he had lied to the officers, should not be considered now because it could not have been considered at the time the trial court ruled upon the admissibility of the statements. To the extent it can be considered at all, it certainly does not undermine the reliability of the original statements. Mark's "recantation" not only was thoroughly impeached by his admission that he was testifying only ***after*** he had been sentenced, ***after*** his family had blamed him for Ben Lilly's conviction and ***after*** his mother filed in court to take away custody of his child (JA 3101-3102), but also by the fact that the "recantation" neither exonerated his brother in the murder of Alexander DeFilippis nor purported to identify the triggerman. (JA 3102-3103). Significantly, Mark's purported recantation did not persuade the court to set aside the jury's verdict.

Finally, Mark's pretrial statements were reliable. The fact that Mark admitted, and took responsibility for, his participation in the crimes indicates their reliability. *See Williamson*, 114 S.Ct. at 2437 (self-inculpatory nature of statement makes it trustworthy); *accord York*, 933 F.2d at 1363. The fact that the statements were given voluntarily to law enforcement officers who tape-recorded them in formal interviews indicates their reliability because Mark surely knew that the officers could and would seek to verify his statements with the surviving victim-witnesses as well as with Gary Barker and the defendant. *See West*, 574 F.2d at 1135 (declarant's interest in gaining favor with the officers "gave him every incentive to be extremely accurate in his reports" because he knew the officers would seek to corroborate and verify his reports).[11] The fact that Mark's statements were corroborated on every material point by the trial testimony of Gary Barker (JA 2025-2150) and the other evidence in the case also demonstrates their trustworthiness. *See Morris*, 229 Va. at 147, 326 S.E.2d at 694 (determination of trustworthiness turns upon whether "there is anything substantial other than the bare confession to connect the declarant with the crime"). Further, the fact that Mark's statements implicated his own brother as the shooter, as opposed to Gary Barker, certainly is a strong indication of their reliability. (JA 2265-2266: in response to Officer Price's request to tell him who did the shooting, Mark stated, "Well, it's kinda hard cause he's my fucking brother man"; JA 2323: in

---

[11] Officer Price cautioned Mark to be truthful and take responsibility for his actions because if he did not, the court would not look at the confession "as it should." (JA 2257).

response to Officer Hamlin's statement that they were trying to find out what happened to the murder victim, Mark said, "Yeah. Yeah, Man, something else, too. I'm going to be getting all these charges and that's my brother I'm telling on."). And yet another indication of the reliability of Mark Lilly's statements is the fact that neither Gary Barker nor the defendant, even now, ever has claimed that Mark was the shooter or even that Mark was more culpable than he had indicated in his pretrial statements.

The statements likewise passed Confrontation Clause requirements. As the trial court properly found, the "firmly rooted" hearsay exception provided the reliability requirement of the Confrontation Clause. (JA 2227). *See Ohio v. Roberts*, 448 U.S. at 66. And the statements further fulfilled the reliability or trustworthiness requirement of the Constitution for the same reasons, discussed above, that that requirement under Virginia law was satisfied. *See York*, 933 F.2d at 1361.

c. Any error was harmless.

Lilly's confrontation argument should be rejected because the trial court properly exercised its discretion in allowing the hearsay into evidence and because the hearsay clearly did not violate the Confrontation Clause. However, even if an error had occurred, it would have been harmless in this case. *See Lee v. Illinois*, 476 U.S. 530, 547 (1985) (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against (the defendant]"; *Schindel v. Commonwealth*, 219 Va. 814, 817, 252 S.E.2d 302,

304 (1979) (erroneously admitted hearsay harmless when the content of the out-of-court statement is clearly established by other evidence). Here, the other evidence overwhelmingly proved that Benjamin Lilly committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA2254-2282, 2318-2332).

It was the defendant's car that was used in the initial part of the crime spree and the defendant's car that broke down, necessitating replacement with another vehicle, and such action most likely was undertaken by the owner of the disabled car. When he was apprehended wielding a shotgun, the defendant lied to the police officers about his identity and that of his accomplices, and that deceptive behavior most likely was engaged in by a guilty person. The defendant made incriminating statements: at the apprehension site, the defendant called to his brother to give himself up because he was "not the one who has done anything wrong;" in the police car, he asked Officer Whitsett to kill him and when the officer asked what a murderer looked like, said "me." A forensic examination of the accomplices' clothing found blood on the defendant's pants leg, yet no blood on Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that his guilt was established by evidence independent of the hearsay statements and that the admission of the hearsay, even if erroneous, was harmless beyond a reasonable doubt.

3. The Trial Court Properly Denied the Motion to Suppress Lilly's Statements Made to Officer Whitsett. (Assign. Error 24, 25)

Lilly argues that the trial court erred in admitting into evidence the statement he made to Officer Whitsett while he was sitting in a police car after he had been apprehended. The challenged statement was Lilly's response "me," made after Whitsett asked, "what does a murderer look like?" (JA 263). Lilly says that the response "me," should not have been admitted because Whitsett had not given him warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and because Whitsett's recollection of the response was not clear or positive. Neither argument, however, demonstrates error.

First, there was no *Miranda* error because Whitsett was not required to give the warnings. *Miranda* applies only to "custodial interrogation." Custodial interrogation takes place when an officer expressly questions a suspect in custody with questions he knows are "reasonably likely to elicit an incriminating response." *Jenkins v. Commonwealth*, 244 Va. at 453, 423 S.E.2d at 365 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The police do not "interrogate" a suspect simply by responding to questions initiated by the suspect. *Jenkins* 244 Va. at 453), 423 S.E.2d at 365. A suspect's statements in such situations are considered "volunteered" and outside the strictures of *Miranda*. *See id.; Wave v. Commonwealth*, 219 Va. 683, 693, 251 S.E.2d 202, 208 (*Miranda* does not apply to volunteered statements or to responses to general "on-the-

scene questioning as to facts surrounding a crime" (quoting *Miranda*, 384 U.S. at 477, 478), *cert. denied*, 442 U.S. 924 (1979).

As the trial court found, when Lilly made his statement, "me," he was not being interrogated. (JA 362). Lilly was apprehended and placed in a police car while the officers searched for the other robbery suspects. (JA 258). Whitsett was standing guard by the car when Lilly asked him to come closer and asked Whitsett to do him a "favor." (JA 273). Lilly asked Whitsett to put a gun in his mouth and pull the trigger. *Id.*). Whitsett said, "I can't do that. Do I look like a murderer?" (JA 274). Lilly then said something to prompt Whitsett to ask, "well, what does a murderer look like, anyway?" to which Lilly said, "me." (JA 263, 2197).

At the time this interchange occurred, Whitsett knew only that robberies had occurred in Pembroke and Eggleston. He had no knowledge that any weapon had been fired, much less that a murder had taken place. (JA 271-272, 2198). Whitsett's question, "what does a murderer look like?" was nothing more than a casual response to the line of conversation initiated and volunteered by the defendant. It was not made with any expectation that Lilly would respond in any incriminating manner. Indeed, Whitsett testified that he was not even taking the defendant's comments seriously and was "more concerned with what was going on around" him. (JA 274). The trial court properly found that the *Miranda* warnings were not required. (JA 363).

The trial court also properly found that the evidence supported Whitsett's recollection of Lilly's statement,

"me." (JA 364). Whitsett initially stated that he "thought" Lilly said, "me," and then later confirmed that he "definitely" said "me." (JA 364).[12] In fact, Whitsett was "startled" at Lilly's response and, when he asked Lilly to repeat what he had said, Lilly told him he was "going to hell to meet his brother." (JA 265). The trial court did not abuse its discretion in finding that the evidence could be submitted to the jury for "such weight as the trier of fact deems appropriate." (JA 364). Lilly offers no rationale or authority for a finding of error in admitting the evidence except his own belief that Whitsett's testimony was speculation, an argument that is not supported by the record and certainly does not demonstrate an abuse of discretion.

III. GUILT PHASE RULINGS

A. The Trial Court Did Not Abuse Its Discretion Regarding Evidentiary Rulings.

Lilly makes several claims of error with respect to evidentiary rulings the trial court made during the course of the guilt phase of trial. Evidence is admissible, however, if it has any logical tendency to prove an issue in a case. *Goins v. Commonwealth*, 251 Va. at 461, 470 S.E.2d at 127 (citing *Coe v. Commonwealth*, 231 Va. 83), 87, 340 S.E.2d 820, 8334 (1986)). Relevant evidence may be

---

[12] The defendant presented no evidence either at the suppression hearing or at trial that his response was anything other than "me."

excluded only if its prejudicial effect outweighs its probative value, a determination entrusted to the sound discretion of the trial court. *Id.* None of Lilly's evidentiary complaints demonstrates that the trial court abused its discretion.

1. The blood on Lilly's clothing (Assign. Error 22)

A forensic examination of the jeans Lilly was wearing when arrested disclosed a small blood stain on the bottom right leg. (JA 2008). Due to the small amount of blood, it could not be tested to determine whether it was animal or human blood. (JA 2016, 2019).[13] This evidence tended to prove that Lilly, unlike Mark and Gary, was in close proximity to the murder victim at the time of the shooting. The trial court ruled that the evidence was admissible and that the defendant could cross-examine the expert to reveal the obvious limitations of the test results. (JA 1993-1994). This ruling was a proper exercise of the court's discretion.

2. Lilly's prior conviction (Assign. Error 32)

Lilly complains that the trial court erred when it allowed the Commonwealth to submit into evidence a felony conviction order to prove the charge of possessing

---

[13] Due to the small amount, the expert had to choose between a "species test" and a DNA test. A "species test" would have consumed the sample, so she elected to do a DNA test. (JA 2019). No DNA results were obtained, however, because of an "amplification" problem in the process. (JA 2016).

a firearm after having been convicted of a felony, instead of allowing the defendant to stipulate to the fact of the prior conviction. Lilly's claim suffers several defects.

First, the record shows that the Commonwealth in fact presented a stipulation to the jury regarding Lilly's prior conviction. (JA 2343). Furthermore, the record demonstrates that the Commonwealth never offered into evidence a conviction order. (JA 2703, prosecutor's closing argument discussing evidence to support charge).

Additionally, although Lilly cites to page 375 of the joint appendix to support his claim, that reference merely contains Lilly's agreement with the court's ruling that the possession charge would be "separated out," a procedure that apparently was not followed. Lilly's claim of error simply is refuted by the record because the trial court in fact admitted the stipulation and no conviction order was introduced.

3. The medical examiner's report (Assign. Error 21)

Lilly argues that the medical examiner's autopsy report should have been excluded as hearsay because the examiner testified at trial. This same argument, however, was rejected in *Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 806 (1982), *cert. denied*, 459 U.S. 1228 (1983), because Virginia Code § 19.2-188 specifically allows for the introduction of the reports. *Fitzgerald* also found that the introduction of the hearsay parts of the report was harmless. In Lilly's case, however, the court allowed into evidence only Dr. Oxley's autopsy report and excluded a local examiner's findings. (JA 1999-2000).

The report that was entered into evidence (JA 2507-3511) contains no hearsay. The court's ruling (JA 1984-1985) was not an abuse of discretion.

4. Joyce Lang's testimony (Assign. Error 26)

Lilly complains that the trial court erred in sustaining the Commonwealth's hearsay objection to testimony from Joyce Lang. The record shows, however, that the Commonwealth withdrew its objection and the court therefore reversed its prior ruling disallowing the testimony and expressly allowed the defendant to present the testimony. (JA 2515-2516). The court's ruling involved testimony from three witnesses, Joyce Lang, Patricia Quesinberry and Warren Nolen. The defendant had proffered their testimonies before the court reversed its ruling. (JA 2503-2513). After the court decided to allow the testimonies, the defense only recalled Quesinberry and Nolen to repeat the proffers for the jury. (JA 1045, 2524). Obviously, error cannot be attributed to the court simply because the defendant chose not to take an opportunity extended by the court.[14]

---

[14] Joyce Lange had testified earlier in the defendant's case and had made the statement that was under challenge – that Gary Barker had told her "he could kill his best friend and not even regret it." (JA 2404). At the ***defendant's*** request, the court instructed the jury to disregard the statement (*Id.*), however, the defendant then excepted to the court's instruction (JA 2405). The defendant's actions, both in asking that the jury be instructed to disregard and in electing not to recall Lang when allowed to do so, waive any objection he now has to the omission of Lang's testimony. *See Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988) (defendant not permitted to approbate and reprobate), *cert. denied*, 490 U.S. 1028 (1989).

5. The tape recordings of Mark Lilly's statements (Assign. Error 34)

The defendant objected to the playing of the audiotaped recordings of Mark Lilly's statements because the tapes had not been provided to him before trial. (JA 2228). Lilly argues on appeal that the admission of the tapes violated a pretrial discovery order.[15]

At trial, the prosecutor's unchallenged representation demonstrated that the prosecutor had not had the tapes in his possession before trial because they were in the Giles County prosecutor's office being used in the case there against Lilly. (JA 2230). The prosecutor likewise represented that Lilly's defense counsel also represented Lilly in Giles County and could have heard the tapes in the course of that representation. (*Id.*). And he further represented that the defendant had had the transcripts of the taped statements for months and had never asked to hear the tapes. (*Id.*).

The trial court remedied the situation by allowing the defense all the time they needed to listen to the tapes before they were played for the jury. (JA 2228-2232). The defense in fact listened to them for an hour and fifteen minutes, and then represented to the court that the interview with Officer Price accurately had been transcribed,

---

[15] At trial he also argued that the failure to produce the tapes violated *Brady v. Maryland*, 373 U.S. 83 (1963). This claim, not pursued on appeal, obviously was without merit. The tapes of Mark Lilly's statements contained no exculpatory matter and, thus, there was no constitutional duty to turn them over to the defense.

but that with respect to the interview with Officer Hamlin, the tape had been only ninety-seven per cent accurately transcribed due to the fact that there were portions of Mark Lilly's answers which were inaudible and that those portions were not reflected at all in the transcript. (*Id.*). Then, before the Hamlin tape was played for the jury, defense counsel represented that they had discussed the matter and, while the transcripts did not reflect all of Mark Lilly's statements, the statements could be heard on the audiotape. (JA 2314). The court admitted into evidence only the audio tapes. The transcripts of the tapes were used by the jury only as a guide during the playing of the tapes and were removed afterwards. (JA 2283, 2315, 2317).

The trial court's resolution of the matter safeguarded the defendant's rights by assuring that he could review the evidence before its introduction in order to make whatever objections he might have. The tapes contained the same information the defendant had had in his possession for months in the form of the transcripts. Clearly the court did not abuse its discretion in this evidentiary matter.

B. The Trial Court Did Not Abuse Its Discretion In Denying Motions For A Mistrial.

"The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.' " *Briley v. Commonwealth*, 221 Va. 563, 576-577, 273 S.E.2d 57, 65 (1980) (citations omitted). The issue of whether a mistrial should

be granted is a matter that rests within the broad discretion of the trial court and will not be disturbed on appeal absent a clear abuse. *Cheng v. Commonwealth*, 240 Va. 26, 40, 393 S.E.2d 549, 606 (1990); *Spencer v. Commonwealth*, 240 Va. at 94-95, 393 S.E.2d at 619. None of Lilly's motions demonstrates that the court abused its discretion.

1. The display of the photograph (Assign. Error 19)

After the Commonwealth had made its opening statement in the guilt phase, Lilly moved for a mistrial based on the fact that the prosecutor had displayed during his statement a photograph of the victim taken before he was murdered. (JA 1477-1479). Because he waited until after the opening statement had been made to complain about the display, he has waived his claim of error on appeal. *See Beavers v. Commonwealth*, 245 Va. 269, 279, 427 S.E.2d 411, 419, *cert. denied*, 10 U.S. 859 (1993).

In any event, no reversible error occurred because, as the trial court found, there was no "harm done whatsoever" by the display of the photograph of the living victim. (JA 1479). Moreover, the trial court directed the Commonwealth to remove the photograph from further display. *Id.*). Clearly the court did not abuse its discretion.

2. The sequestered witness (Assign. Error 23)

During the cross-examination of Gary Barker, defense counsel asked him if he had read the newspaper that day and Barker said he had read the Roanoke Times. (JA 2109). Lilly then asked that Barker's testimony be stricken

because, as a sequestered witness, he was not supposed to read newspaper accounts of the trial. When the court overruled the motion, Lilly moved for a mistrial that also was overruled. (JA 2112-2114). Before ruling, the court obtained the newspaper, read it, and questioned Barker to ascertain that the paper had not influenced his testimony. (JA 2112). The court found that (1) Barker had not been present when the other witnesses had been admonished not to read the papers, (2) Barker swore nothing in the paper had influenced him and (3) there was nothing in the paper "that could influence his testimony." (JA 2114).[16] The court's ruling was a wholly reasonable exercise of its discretionary powers over the conduct of the trial.

3. The display of the gun (Assign. Error 28)

During the prosecutor's closing argument in the guilt stage, he held the murder weapon in his hand. Defense counsel objected because the gun was pointed at him. (JA 2763). The court responded, "Mr. Tuck, now, that's ridiculous. It's not pointed at you. That's not pointed at you, nor is it pointed at anyone in this Courtroom." (JA 2764). The prosecutor apologized, saying that he "had not meant to point a pistol at anyone." (*Id.*). After the closing arguments had concluded and the jury had retired to deliberate, counsel stated that, based on his objection and

---

[16] The defendant admitted at trial that Barker had not been present for the court's admonishments. (JA 2109). Further, he presented nothing at trial (or now) to contradict the court's findings.

the court's reaction, a mistrial was called for. (JA 2772). The court overruled the motion and also counsel's request for a jury instruction to the effect that his objection regarding the gun was "well-taken." (JA 2773-2774).

The court found that the prosecutor's actions were "absolutely unintentional" (JA 2775) and further that, from the court's observation of the jury, nothing the court had said in "any way" adversely affected the jury's ability to be fair to the defendant. (JA 2803-2804). The court noted that it had instructed the jury early on that it should not interpret any remark or ruling by the court as favoring one side or the other and found that there was no reason to believe the jury had not followed that instruction. (*Id.*). The court's ruling quite clearly was not an abuse of its considerable discretion in this matter.

C. The Trial Court Properly Rejected An Instruction On Intoxication. (Assign. Error 27).

The trial court properly rejected the proffered instruction on intoxication because the evidence did not support it. (JA 2674-2676). The court found that, while there was drinking on the part of the defendant, the evidence did not show that he was so intoxicated as to render him incapable of committing a willful, deliberate and premeditated act. (JA 2675). Specifically, the court noted that the defendant was able to follow the arresting officer's instructions, coherently and clearly respond to the interrogating officer's questions, and that he committed the convenience store robbery without signs of intoxication, including holding the knife carefully by the blade end and throwing it so as to land in the floor. (JA

2675-2676). These findings by the trial court demonstrate the correctness of its ruling. *See Jenkins*, 244 Va. at 458, 423 S.E.2d at 368-369 (affirming refusal of intoxication instruction on similar factual basis).

IV. PENALTY PHASE ISSUES

A. The Trial Court Properly Refused The "Reasonable Doubt" and "Residual Doubt" Instructions. (Assign. Error 29, 30).

Lilly admits that there is no authority for his instruction I-1 (JA 77EEE), directing the jury to impose a life sentence if it has a "reasonable doubt" about punishment. The trial court properly found that the burden of proof was covered in the pattern instruction OK which was given. (JA 77TT, 2971). In fact, Lilly's proffered instruction imposed a burden of proof (beyond a reasonable doubt) on the final sentencing decision that is contrary to Virginia law and far more detrimental to the defendant than existing law. In Virginia, the capital sentencing jury is free to impose a life sentence for any reason, even if it has found an aggravating factor to exist beyond a reasonable doubt. *See Buchanan v. Angelone*, 118 S.Ct. ___, 1998 U.S. LEXIS 638 at *15-16 (1998) ("The jury was . . . allowed to impose a life sentence even if it found the aggravating factor proved" through Virginia's pattern sentencing instruction).

The trial court also properly rejected an instruction on "residual doubt." (JA 77CCC, 2976-2977). *See Franklin v. Lynau*, 487 U.S. 164, 173 (1988); *Stockton* 241 Va. 192, 211, 402 S.E.2d 196, 207, *cert. denied*, 502 U.S. 902 (1991).

B. The Sentence Of Death Was Not Imposed Under The Influence Of Passion, Prejudice Or Any Other Arbitrary Factor And It Was Not Excessive Or Disproportionate To The Penalty Imposed In Similar Cases.

Lilly makes no argument that his sentence was either arbitrarily or disproportionately imposed but, pursuant to § 17-110.1, this Court is required to determine whether the sentence was imposed under any improper influence and whether it is disproportionate to sentences in similar cases. The record clearly supports no such findings that the sentence was imposed contrary to law.

The jury found beyond a reasonable doubt that Lilly was a "future danger" and that his crime was "vile" in that it involved torture, depravity of mind and an aggravated battery. (JA 3430). These findings were supported fully by the record. From the age of nineteen, Lilly engaged in serious criminal behavior involving numerous instances of breaking and entering, assaults on law enforcement officers, destroying property and larceny. (JA 2818-2822). In 1992, he was sent to prison for breaking and entering, grand larceny and malicious wounding. (JA 2821). In 1993, he was convicted for escape. (*Id.*). He was paroled on July 10, 1995, and was on parole when he murdered Alex DeFilippis. (JA 2826-2827). This record indisputably demonstrated that he would continue to commit criminal acts of violence that threatened society.

The record also revealed that Lilly murdered Alex DeFilippis without provocation or justification, simply in order to eliminate him as a witness to the robbery of

Alex's car and money. The record shows the brutal, callous and merciless method used by Lilly in the murder: he made Alex strip down to his underwear and socks on a frigid, windy, December night miles away from any help. He psychologically tortured Alex by leading him to believe that he could walk away from his abductors, and then cruelly chasing him down and shooting him three times in the head. Alex suffered before he died, as was evidenced by the zigzagging trail of blood that followed his last steps and by the horrible death pose in which he had his arm raised to defend himself before he finally fell. The senseless torture, depravity of mind and aggravated battery inflicted on this innocent young man fully justified the sentence of death alone. The record in this case discloses no arbitrary factor at work in the imposition by the trial court of the jury's entirely appropriate sentence.

The sentence of death in this robbery/murder case that involved both of Virginia's aggravating factors was not disproportionate to sentences imposed in other similar cases. *See e.g., Clagett v. Commonwealth*, 252 Va. 79, 472 S.E.2d 263 (1996), *cert. denicd*, 117 S.Ct. 972 (1997); *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865 (1983); *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982), *cert. denied*, 460 U.S. 1029 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1982); *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

V. CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

By: /s/ Katherine Baldwin
Counsel

MARK L. EARLEY
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

CERTIFICATE OF SERVICE

On February 9, 1998, three copies of the foregoing Brief for the Commonwealth were mailed to Max Jenkins, Esquire, JENKINS & JENKINS, Post Office Box 886, Radford, Virginia 24141, and Christopher A. Tuck, Esquire, 805 Triangle Street, Post Office Box 11422, Blacksburg, Virginia 24062, counsel for appellant.

/s/ Katherine P. Baldwin
Katherine P. Baldwin
Assistant Attorney General

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 972385

BENJAMIN LEE LILLY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Max Jenkins
JENKINS & JENKINS
Post Office Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck
ATTORNEY AT LAW
805 Triangle Street
Post Office Box 11422
Blacksburg, VA 24062
(540) 552-4567

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 1, 3, AND 8

The Attorney General maintains in its brief to the Court that Jurors Huffman, Mitchell, and Jones were properly struck for cause. However, this analysis fails to review the entire voir dire; rather the Attorney General relies on selected portions.

Ms. Huffman states quite clearly that she can perform her duty as a juror. (JA 513):

> THE COURT: Now that's somewhat in my mind conflicts with what you said earlier, so I want to make sure that we are all clear because this is a most important consideration, so let me repeat to make sure if I heard you correctly there is or is not any conflict in your opinions, and the final question I am going to repeat is, do you have personally any opinion, or any belief, that would prevent you from convicting anyone of an offense, in this case capital murder, which is punishable by death. Now I want to know how you reconciled your answer with your last answer?
>
> MS. HUFFMAN: Also that I don't believe in the death penalty, but if I had to be on the case I would be fair in what my decision would be.
>
> THE COURT: All right, because of your belief and your opinion, would that in fact prevent you from imposing the death sentence after you had heard and considered all evidence.
>
> MS. HUFFMAN: I don't think that would be a problem.

(JA 526):

> MR. SCHWAB: Do you feel that you are morally, mentally and physically capable of assuming the responsibility to be called upon to return a possible death penalty verdict?
>
> MS. HUFFMAN: Yes.
>
> MR. SCHWAB: And would it effect you or your family in any way if you were on a jury that found the defendant guilty of capital murder that must consider and perhaps return a death penalty verdict?
>
> MS. HUFFMAN: No.
>
> MR. SCHWAB: That wouldn't affect you?
>
> MS. HUFFMAN: No it wouldn't bother me.

In the matter of Ms. Mitchell, the Attorney General claims that Ms. Mitchell could not consider the death penalty for religious reasons; however, that is not what Ms. Mitchell said. (JA 789):

> MR. SCHWAB: Do you think those standards are high enough for your struggle with the death penalty to allow you to consider both the death penalty and life imprisonment?
>
> MS. MITCHELL: I think so.
>
> MR. SCHWAB: Do you feel that if you found beyond a reasonable doubt that he was a serious threat to society, or in committing this crime that he was vile, or horrible or inhuman, that you could consider imposing the death penalty?
>
> MS. MITCHELL: I believe so.

(JA 791):

> MS. MITCHELL: Oh I admit I would find it difficult to do, but I've never been put in that

position and I guess I've never really searched myself to know what my feelings would be in that regard because I've never been in that position to have to really make a final step on that. I guess if I went through and knew details and knew situations to be proven to me beyond a doubt that I could probably do that, I hate that I can't answer more with definite regard for that, but I would just say that I would hope that I could be that way, that I could do it.

MR. SCHWAB: so you would at least try to figure out what the evidence was?

MS. MITCHELL: Right.

In *Witherspoon v Illinois*, 391 U.S. 510 (1968) the United States Supreme Court held that the state cannot sweep all jurors who express beliefs opposed to capital punishment. *Witherspoon* at 520. Moreover, the United States Supreme Court further stated in *Davis v Georgia*, 429 U.S. 122 (1976) that even excluding one juror simply because of their opposition to the death penalty is reversible error. However, that is exactly what the trial court did in the cases of Ms. Huffman, Ms. Mitchell, and Ms. Jones.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 5 AND 6

The Attorney General's position appears to be that there was no reasonable doubt that either Jurors Rakes or Shumate were qualified to sit on the jury; a position that fails to review the entire voir dire. When Rakes is questioned about his relationship with Chief Whitsett by Lilly the following is stated: (JA 987):

MR. TUCK: If he [referring to Whitsett] was called as a witness in this case do you feel that you could be objective, or do you feel that you might have some inclinations to believe him more than any other witness and Mr. Schwab's told you that all the witnesses when they come in here are supposed to have a clear slate and I am asking you to be honest with yourself, do you feel that you would believe Chief Whitsett more than other witnesses because of your relationship?

MR. RAKES: I think anyone that you know something about or have some information about might seem to be more credible up front than someone you didn't know anything at all about.

MR. TUCK: So you would find his testimony to be a little bit more credible than the average witness, than someone you didn't know, again I am asking you to be honest with yourself?

MR. RAKES: It's a difficult question, but I think you would tend to you know, if you knew something about someone or knew something he could do.

Even when initially questioned by the Court, Rakes still concedes that he would believe Whitsett more than other witnesses. Only after a second long leading question does Rakes give the expected answer. These persuasive suggestions are exactly what this Court has cautioned against in *Breeden v Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976) and *Parsons v Commonwealth*, 138 Va. 764, 773, 121 S.E. 68, 70 (1924).

In Shumate's case he did state that he could set aside his close friendship and the fact that Investigator Hamlin

was his second cousin. However, Shumate's relationship to Hamlin was so close that it would violate Lilly's right to a fair and impartial jury as guaranteed by the United States Constitution Amendments 6th through 14th and the Virginia Constitution Article 1 § 8. Lilly maintains that Investigator Hamlin was a party to this action or so similarly situated and thereby automatically excluded under *Gray v Commonwealth,* 226 Va. 591, 311 S.E.2d 409, (1984). In *Gray* this Court held that a juror cannot sit if he is related within the ninth degree of kinship of the victim of the crime or a party of record. Lilly argues that either Hamlin is a party to this matter or it can be inferred that he is similarly situated that in effect he was a party.

Specifically, Lilly points to the fact that counsel could not obtain Investigator Hamlin's notes regarding this case through a subpoena duces tecum due to the fact that his employer is deemed to be a party to this action. Thereby, Lilly maintains that investigator Hamlin should be considered a party. However, whether under *Gray* or *Breeden* it was reversible error to sit Shumate as a juror.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 24 AND 25

The Attorney General's argument regarding the alleged statement to Whitsett fails to address the fact that there was a break in the conversation and that Chief Whitsett then initiated the conversation. (JA 262 – 263)

> Q. And then you indicated that he was sitting in the police car at the time with the window cracked –
>
> A. Yes, sir.

> Q. Probably about five (5) or six (6) inches, is that correct?
>
> A. Yes, that's my recollection.
>
> Q. Then you asked him, well, what does a murderer look like anyway, is that correct?
>
> A. Something along those lines, yes, sir.
>
> Q. And he said, and he sort of hesitated a moment – and I backed away from the car and I thought him, I thought I heard him say me?
>
> A. That's right.

(JA 273 – 274):

> Q. And that's when you said, do you want to make me a murderer or do you look, do I look like a murderer?
>
> A. I said that, I said, well, you know, I can't do that. Do I look like a murderer?
>
> Q. And then did you move away from the car at that point, or –
>
> A. Yeah, I sort of backed up, so I didn't take him very serious, of course, I was more concerned with what was going on around me as opposed to his questions because we, we thought that there were still some people at large and we were in a secluded area. It was dark and I felt a little uneasy being exposed to the possibility of someone else being out there.
>
> Q. And then he said something else?
>
> A. Yes.

Q. Which you've indicated in your interview and I believe also your testimony at the preliminary hearing where you said – I thought he said me?

A. Yes.

When these two statements are taken into context together it is apparent that Whitsett backed away from the car after he asked Lilly if he (Whitsett) looked like a murderer. Then Whitsett asked Lilly, "what does a murderer look like?" The Attorney General further argues that the question "what does a murderer look like" was not a question that was reasonably likely to elicit an incriminating response. However, the Chief was aware of two *armed* robberies and was concerned that several men were armed and running loose. The United States Supreme Court held in *Rhode Island v Innis*, 446 U.S. 291 (1980) that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response . . . " at *Innis* 301. Under the circumstances it is clear Whitsett should have known that under the circumstances Lilly's response could be incriminating.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 22

The Attorney General maintains that the trial court did not abuse its discretion when it allowed the Commonwealth to introduce evidence of blood being found on Lilly's leg. However, the Attorney General fails to show how having blood on the *back* of the Defendant's pant leg is more probative than prejudicial. Unless the

Attorney General is arguing that Lilly had his back turned when the victim was shot, removing the possibility that Lilly was the triggerman, then the blood did not have probative value leaving only the prejudicial effect. Moreover, the Attorney General fails to address the fact that all of the defendants had killed a goose which had bled profusely and which blood was found on the Defendant's car.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 26

The Attorney General maintains that Barker's statement to Ms. Lang that he could kill his own best friend and never regret it was admissible. However, the trial court only allowed the statement in order to show why Ms. Lang did not allow her son to go along with Barker; the trial court refused to admit the statement for impeachment of Barker or for the truth of the matter asserted.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 34

As to the tapes of Mark Lilly's statements, the Attorney General argues that while the discovery order demanded that the Commonwealth provide the tapes before trial, the Commonwealth was not required to do so because the tapes were in Giles County and that defense counsel had transcripts of the tapes. However, this analysis fails to take into account that one of the taped statements was conducted by *Montgomery County* Investigators Fleet and Hamlin and that Lilly was never tried on

the Giles County charges. Moreover, the charges in Giles were nolle prosequi.

As for the fact that Lilly was provided copies of the transcripts, Lilly argues that tapes can show voice inflections that cannot be transcribed. Moreover, simply allowing Lilly at trial to listen to the tapes was not consistent with the discovery order entered by the trial court.

REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR 17 AND 18

The Attorney General responds that Mark Lilly's statements were admissible under *Chandler* because the statements were reliable and that for the purposes of the Confrontation Clause, a statement against penal interest is a firmly rooted exception to the hearsay rule.

The United States Supreme Court held in *Lee v Illinois*, 476 U.S. 530, 541 (1986) that an accomplice's confession that incriminates a defendant is presumed to be unreliable. Moreover, Virginia Code § 18.2-18 states that "an accessory before the fact or principal in the second degree to capital murder shall be . . . tried . . . as though the offense were murder in the first degree." Thereby any statement Mark Lilly made naming anyone else as the triggerman favored his penal interest by excluding him from Capital Punishment. Moreover, if the Attorney General argument is correct, Mark Lilly could have admitted that all he did was drive on a suspended license, and nothing else, and any subsequent or additional statements naming co-defendants would be admissible as statements made against penal interest.

In *Williamson v United States*, 512 U.S. 594 (1994) held that under the federal rules of evidence, statements such as Mark Lilly's are not admissible. Rather the federal courts recognize the inherent unreliability of a co-defendant's confession when said confession implicated the Defendant. Moreover, the fact that the *Williamson* court ruled an federal rules does not diminish the argument; rather it simply illustrates the general practice of the Supreme Court in avoiding constitutional pronouncements when there is a narrower ground for ruling.

One of the keystones that the Attorney General relies on in attempting to show Mark Lilly's reliability is the fact that they are brothers. However, it is clear that before Mark gives the statement that his brother was the triggerman, he has already attempted to lie to Price in an attempt to place the blame for the Floyd breaking and entering an his brother. (JA 2258) Throughout the interview with Price, Mark showed no such reluctance in blaming every possible criminal infraction on anyone but himself.

The Attorney General argues that Lilly did not have the right to question and inform the jurors during voir dire that parole had been abolished. Lilly calls this Court's attention to *Morgan v Illinois*, 504 U.S. 719 (1992) which held that if a juror believed the mitigating evidence was irrelevant then said juror could not be seated. Lilly maintains that he was entitled to ask the jurors if they knew parole had been abolished and if the juror could more objectively consider life in prison if the Defendant would never become eligible for parole. (JA 367) Lilly maintains that "life means life" is a mitigating factor under *Simmons v South Carolina*, 114 S.Ct. 2187

(1994) and that he should have been allowed to ask prospective jurors if they could consider it.

The Attorney General argues that even if the confrontation clause was violated, that such a violation would be harmless error because there was overwhelming evidence of the Defendant's quilt. The Attorney General points to the fact that the Defendant was wielding a shotgun, however, it is clear that the shotgun was not the murder weapon nor did the Defendant point the weapon at any officer. (JA 248) Another point by the Attorney General is that Lilly told the officers a false name about those who fled the scene, but his brother was later apprehended using that same false name. In addition, the murder weapon was found in the direction where Mark Lilly fled from police.

Other evidence relied on by the Attorney General is the statement that Officer Whitsett thinks he heard. (JA 25-26) Only after Whitsett is called to testify does his recollection change to indicate that he was certain what the Defendant stated. The final piece of evidence relied on is the blood found on Lilly's leg, however the Attorney General does not inform this Court that the blood was found on the back of Lilly's leg. (JA 2008) Having blood, that cannot be identified as being human, on the back of one's pant leg only shows that if it was the victim's blood, Lilly must have had his back turned when the victim was shot, making it nearly impossible for Lilly to have been the triggerman.

REPLY IN SUPPORT OF ASSIGNMENT OF ERROR 32

After reviewing the record, Counsel for Appellant requests that assignment of error 32 be withdrawn from consideration by the Court. After reviewing the Attorney General's brief, the Appellant does not believe that his initial assertion is supported by the record.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be overturned.

Respectfully submitted,

BENJAMIN LEE LILLY,
Appellant

By: /s/ Christopher A. Tuck
Counsel

Max Jenkins, Esquire
JENKINS & JENKINS
PO Box 886
Radford, VA 24141
(540) 639-9088

Christopher A. Tuck, Esquire
PO Box 11422
Blacksburg, VA 24062
(540) 552-4567

CERTIFICATE OF SERVICE

We, Max Jenkins and Christopher A. Tuck, Court-Appointed Counsel for Appellant, Benjamin Lee Lilly, do hereby certify that true and correct copies of the above Reply Brief have been mailed to the Clerk of the Supreme Court

of Virginia at 100 North Ninth Street, Richmond, Virginia 23219; Appellee Katherine Baldwin, Assistant Attorney General at 900 East Main Street, Richmond, Virginia 23219, (804) 786-9527; on this 20th day of February, 1998.

/s/ Christopher A. Tuck
Christopher A. Tuck

---

255 Va. 558

Benjamin Lee LILLY

v.

COMMONWEALTH of Virginia.

Record Nos. 972385, 972386.

Supreme Court of Virginia.

April 17, 1998.

Max Jenkins; Christopher A. Tuck (Jenkins & Jenkins, on briefs), Radford, for appellant.

Katherine P. Baldwin, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Benjamin Lee Lilly (Lilly). Lilly was also convicted of lesser offenses arising out of the same occurrence, but does not directly challenge the sufficiency of the evidence to support his convictions for the lesser offenses.

I.

PROCEEDINGS

On April 1, 1996, indictments were returned against Lilly charging that on December 5, 1995, Lilly abducted and robbed Alexander V. DeFilippis, Code §§ 18.2-47 and 18.2-58, carjacked DeFilippis' vehicle, Code § 18.2-58.1, and subsequently murdered DeFilippis as part of the commission of the robbery, Code § 18.2-31(4). Lilly was

also charged with use of a firearm in the principal offenses and for possession of a firearm after having previously been convicted of a felony. Code §§ 18.2-53.1 and 18.2-308.2(A)(i).

Lilly filed pre-trial motions to exclude evidence of a statement he made to Pearisburg Police Chief William Whitsett, to permit voir dire of jurors concerning parole ineligibility issues,[1] to exclude evidence of Lilly's refusal to submit to a paraffin gunpowder residue test, and for a bill of particulars. Lilly also sought to exclude from evidence statements made by Mark Lilly, Lilly's brother and a co-participant in these crimes, asserting that their admission would be a violation of the hearsay rule and of the confrontation clause. The trial court denied all of these motions. Lilly also filed a motion for a change of venue, which the trial court took under advisement pending selection of the jury.

Lilly also filed a discovery request seeking, *inter alia*, "[a]ll alleged confessions or statements of any kind made by the Defendant or any alleged co-conspirator . . . in every media in which each such confession or statement may exist." The trial court granted the discovery motion and the Commonwealth supplied Lilly with, among other items, transcripts of the tape-recorded statements of Mark Lilly.

---

[1] In addition, Lilly sought to argue parole ineligibility as a mitigating factor and to submit jury instructions on this issue during the penalty phase. The trial court granted these portions of the motion.

Jury selection began on October 15, 1996 and continued over four days. Trial commenced on October 21, 1996 and proceeded for five days, concluding with a jury verdict finding Lilly guilty on all counts of the indictments. The penalty phase of the trial occurred on October 28, 1996, concluding with a jury recommendation of a sentence of death for the capital murder charge and two life terms plus a total of 27 years for the lesser offenses. The trial court entered judgment on the jury's verdict and imposed the sentences by final order dated March 7, 1997.

II.

EVIDENCE

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265, *cert. denied*, ___ U.S. ___, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). Gary Wayne Barker, the Commonwealth's principal witness, shared a room with Mark Lilly. Barker testified that on the day before the murder, he, Lilly, and Mark Lilly were at Lilly's home "drinking" and smoking marijuana. Later, the three men drove to a friend's house to "drink a little bit with him." When they discovered that the friend was not at home, the three men broke into the house and stole several guns, a safe, and a quantity of liquor. They subsequently broke open the safe and divided its contents.

The three men then drove to Radford where they tried unsuccessfully to trade the stolen guns for marijuana. They then went to stay at the home of an acquaintance in Blacksburg. During this time they continued to drink and smoke marijuana.

The following morning, the three men drove over the back roads in the vicinity of Shawsville and Elliston, stopping to fire the stolen guns at some geese and killing one, which they put in the trunk of the car. They again attempted to trade the guns for marijuana at a trailer park and a bar in Blacksburg.

Near Heathwood, the car in which the three men were travelling broke down in the vicinity of a convenience store. They removed the liquor and guns from the car. DeFilippis, who had driven to the store with a friend, was inspecting a tire on his vehicle while his friend went into the store. Lilly, carrying one of the stolen guns, confronted DeFilippis and called for Barker and Mark Lilly to join him. Lilly ordered DeFilippis into DeFilippis' car and Mark Lilly and Barker also got into the vehicle. Lilly then drove the vehicle away from the store and ordered DeFilippis to surrender his wallet.

Lilly drove DeFilippis' car to an isolated point on the bank of the New River near Whitethorne, stopped the car, and ordered DeFilippis to get out. Mark Lilly was carrying one of the stolen guns, a pistol. The other guns were left in the car. Lilly ordered DeFilippis to strip to his underwear and walk away from the car. After throwing DeFilippis' clothing into the river, the three men returned to the car. Lilly took the pistol from Mark Lilly, ran up to DeFilippis, turned him around, and shot him four times, fatally striking him three times in the head and once in the arm.

Lilly returned to the car, leaving DeFilippis' body in the road. Barker and Mark Lilly asked Lilly why he had shot DeFilippis. He replied that DeFilippis had seen

Lilly's face and that "I ain't going back" to the penitentiary.

The three men bought beer with the money they had stolen from DeFilippis and then drove to the McCoy River where they disposed of "anything that might have our prints on it," although they retained the murder weapon and the other guns. They then drove to "a little market" in Giles County, where they robbed the owners of cash and some merchandise.

Determining that the money from this robbery was not sufficient "[t]o get us out of . . . town," they drove to another store, also in Giles County. Barker and Mark Lilly entered that store and attempted to rob the clerk. They were interrupted by the owner who grabbed Barker. Barker broke free and the two men fled to the car. The owner followed them as Lilly drove away. Barker fired one of the guns into the air to let the owner know that they were armed, and he ended his pursuit.

A short time later, the car broke down. As the three men were removing the stolen merchandise from the car, police officers arrived. The three men fled on foot, with Barker and Lilly being captured almost immediately.

One of the officers responding to the report of these robberies was Police Chief Whitsett. While Lilly was sitting in a police car and Whitsett was standing nearby, Lilly asked Whitsett to place his shotgun in Lilly's mouth and pull the trigger. Whitsett refused and asked Lilly "if I looked like a murderer?" In reply to a comment made by Lilly, Whitsett then asked, "what does a murderer look like anyway?" Lilly replied, "me."

Barker and Mark Lilly both told the police about the DeFilippis murder in their statements. In his initial statement to police, Lilly did not mention the murder and maintained that the other two men had forced him to participate in the robberies.

We will recite other relevant facts and proceedings within the discussion of the assignments of error.

III.

ISSUES PREVIOUSLY DECIDED

Lilly has assigned error to the trial court's failure to order the Commonwealth to provide a general bill of particulars prior to trial, as well as a bill of particulars of the aggravating factors upon which the Commonwealth would rely during the penalty phase of the trial. Lilly has further assigned error to the trial court's finding that the Virginia death penalty statute is not unconstitutional. The arguments raised in these assignments of error have been thoroughly addressed and rejected in numerous prior capital murder cases. We find no reason to modify our previously expressed views on these issues. *Clagett*, 252 Va. at 85-86, 472 S.E.2d at 266-67.

IV.

JURY SELECTION

Lilly assigns error to the trial court's refusal to allow him to depart from the trial court's approved list of questions during voir dire. The record shows that the trial court and counsel for the defense and the Commonwealth conferred extensively in advance of the voir dire

concerning the questions to be asked of potential jurors. Lilly has failed to identify any question he was not allowed to ask or to show that any potential juror was not fully questioned. A party must have a full and fair opportunity to examine the venire, but the trial court retains discretion to determine when a defendant has had such an opportunity. *Buchanan v. Commonwealth*, 238 Va. 389, 401, 384 S.E.2d 757, 764 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). Lilly has failed to demonstrate that he was in any way prejudiced by the trial court's limiting of the questions which could be put to prospective jurors, and we will not disturb the trial court's determination in this matter. *Id.*

Lilly further asserts that the trial court erred in refusing to permit him to "educate" the jurors on the issue of parole ineligibility of defendants upon whom life sentences are imposed in capital murder cases. He contends that the requirement of *Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994), that the trial court instruct the jury on parole ineligibility requires that the venire be informed on this issue at the outset of trial and that individual jurors may be questioned on their views of this issue. We disagree.

The clear import of *Simmons* is that, once a defendant is convicted of a capital crime, he has, as a matter of due process, the right to have the jury informed of his ineligibility for parole in order that this factor may be weighed by the jury against the finding of his further dangerousness to society. Nothing in *Simmons* even remotely suggests that knowledge of parole ineligibility rules and exploration of potential jurors' opinions on that

subject would be a proper topic for voir dire.[2] The probable confusion and prejudice such an inquiry would cause in the minds of jurors is self-evident. Accordingly, we reject Lilly's contention that he should have been permitted to "educate" and examine the venire on this issue.

Lilly assigns error to the trial court's dismissal for cause of six members of the venire. Each of the prospective jurors expressed strong moral or religious reservations about her ability to impose a sentence of death. Three of the jurors, Connie Huffman, Kristina Mitchell, and Ollie Jones, ultimately agreed, but with some continuing equivocation, that they could follow the trial court's instructions.

In asserting that these jurors should not have been excused, Lilly confines his argument to a discrete portion of the examination of each of them. We must consider the voir dire as a whole, not just isolated statements. *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

The trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error. *Stockton v. Commonwealth*, 241 Va. 192, 200, 402 S.E.2d 196, 200, *cert. denied*, 502 U.S. 902, 112

---

[2] The record reflects that the jury was properly instructed on parole ineligibility during the penalty phase of the trial and that Lilly was permitted to argue that his parole ineligible status militated in favor of a life sentence.

S.Ct. 280, 116 L.Ed.2d 231 (1991). In the present case, the trial court had the opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial court. Nothing in the record suggests that the trial court abused its discretion in striking these jurors from the venire for cause despite the attempts of the defense to rehabilitate them.

The trial court found that the other three prospective jurors, Ann Mumaw, Leona Wallace, and Janet Matheson, were adamant in their personal opposition to capital punishment and could not impose a death sentence. Lilly contends that by excluding them from the venire, he was denied the opportunity of having a jury of his peers. Where a juror has clearly indicated that she will be unable to follow the trial court's instructions and consider all the available penalties that might be imposed, it is appropriate for the trial court to excuse the juror for cause. *Gray v. Commonwealth*, 233 Va. 313, 334, 356 S.E.2d 157, 168, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). The elimination of such jurors from the venire "does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community." *Id.* at 335, 356 S.E.2d at 169; *see also Poyner v. Commonwealth*, 229 Va. 401, 413-14, 329 S.E.2d 815, 825 (1985).

Lilly assigns error to the retention of three members of the venire over his motion that they be excused for cause. James Rakes stated during voir dire that he was acquainted with Chief Whitsett and that he might give more credence to Whitsett's testimony as a result. Upon further examination, Rakes stated that he could set aside

his acquaintance with Whitsett and consider the testimony of all the witnesses on an equal plane.

Samuel Shumate stated during voir dire that he was a second cousin and "real good friend" of Investigator Ron Hamblin, a prospective witness for the Commonwealth. Shumate testified that his relationship and friendship with Hamblin would not be a factor in considering Hamblin's testimony against that of other witnesses.

Lilly also asserts that an unidentified juror was permitted to remain on the jury panel after having "read a newspaper article about Mr. Lilly's past." Lilly initially objected to the seating of any juror who had been exposed to specific newspaper articles, and this assignment of error apparently relates to a member of the venire who had read one of the articles and was actually seated on the final jury panel. In addressing the issue immediately prior to trial, the trial court reiterated that it accepted the juror's testimony that the article had not prejudiced her.

As noted above, the decision to retain or excuse a juror rests within the sound discretion of the trial court. Here, the trial court had the opportunity to observe these three jurors and evaluate their responses to the questions put to them. Nothing in the record suggests that the refusal to strike these jurors constitutes manifest error by the trial court, and we will not disturb the trial court's exercise of its discretion in these instances. *Stockton, supra.*

Lilly further maintains that juror Shumate should have been excused on the ground that Shumate was

related to a "party" to the suit.[3] Code § 8.01-358; Rule 3A:14(1). With respect to the application of this rule in criminal cases, we have held that, even though the victim is not a party to the proceeding, a person is disqualified from serving as a juror if he is related to the victim. *Jaques v. Commonwealth*, 51 Va. (10 Gratt.) 690, 695 (1853); *see also Gray v. Commonwealth*, 226 Va. 591, 593-94, 311 S.E.2d 409, 410 (1984).

Lilly asserts that Investigator Hamblin is a "party" to this criminal proceeding. Lilly apparently bases this assertion on the fact that this officer's role in the investigation of the crimes in question was significant to the prosecution's case. Although we have not previously addressed this issue, we hold that when the officer's sole role in a criminal prosecution is as a witness, he is not a "party" within the meaning of Code § 8.01-358 and Rule 3A:14(1). Thus, a juror's relationship to such a police officer-witness does not require *per se* dismissal of that juror from the venire, and the juror may be retained if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly. *See State v. Lee*, 559 So.2d 1310, 1317 (La.1990); *State*

---

[3] The Commonwealth asserts that Lilly did not raise this issue below and should be barred from raising it for the first time on appeal. Rule 5:25. However, in noting his objection to the trial court's retention of Shumate, Lilly's counsel stated, "This is a relative and this is a friend." "It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case." *Salina v. Commonwealth*, 217 Va. 92, 93, 225 S.E.2d 199, 200 (1976). The objection noted the family relationship and was sufficiently clear to raise the issue of whether the juror could "stand indifferent to the cause." Code § 8.01-358.

v. Hunt, 115 N.J. 330, 558 A.2d 1259, 1267-68 (1989); *Arner v. State*, 872 P.2d 100, 104 (Wyo.1994).

V.

VENUE

After the jury panel was selected, the trial court, which had deferred consideration of the motion, denied Lilly's motion for a change of venue made on the theory that pre-trial publicity had potentially prejudiced the members of the venire. The trial court noted that the selection of the jury panel had not proved difficult, with fewer than half of the jurors stating that they had heard or read about the case, and with none showing particular bias as a result of the pre-trial publicity. Lilly asserts that the trial court erred in not granting the change of venue. We disagree.

A presumption exists that the defendant will receive a fair trial in the jurisdiction in which the offense occurred. *Stockton*, 227 Va. at 137, 314 S.E.2d at 379-80. In order to overcome that presumption, the defendant must demonstrate that the citizens of the jurisdiction feel such prejudice against him that it is reasonably certain he cannot receive a fair trial. *Id.* Accordingly, the decision whether to grant a change of venue lies within the sound discretion of the trial court. *George v. Commonwealth*, 242 Va. 264, 274, 411 S.E.2d 12, 18 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

The fact that there have been media reports about the accused and the crime does not necessarily require a change of venue. *Buchanan*, 238 Va. at 407, 384 S.E.2d at

767-68. The trial court should consider "the difficulty encountered in selecting a jury" as a significant factor in determining whether actual prejudice has resulted from the publicity. *Mueller v. Commonwealth*, 244 Va. 386, 398, 422 S.E.2d 380, 388 (1992), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993). The record here adequately reflects that the trial court acted well within its sound discretion in denying a change of venue in light of the ease with which a qualified jury panel was selected.

VI.

GUILT PHASE

A. *Commonwealth's Use of Photographs and Videotape*

During its opening statement, the Commonwealth displayed an enlarged "in life" photograph of the victim to the jury. At the conclusion of that opening statement, Lilly made a motion for a mistrial, asserting that the photograph showing the victim alive was inherently prejudicial because it tended to invoke sympathy for the victim. The trial court found that there was no prejudice to the defendant as a result of the use of the photograph and overruled the motion, but directed that the Commonwealth remove the photograph from further display. Lilly assigns error to the trial court's failure to grant a mistrial.

Lilly cites no authority for the proposition that photographs of the victim taken before his death are inherently prejudicial, an issue not previously addressed in this Commonwealth. Those jurisdictions that have considered the issue have held that there is no inherent prejudice in the use of in life photographs of the victim,

especially where the jury will also view crime scene photographs showing the victim. *See, e.g., State v. Broberg*, 342 Md. 544, 677 A.2d 602, 610 (1996). Thus, the use of in life photographs is a matter committed to the discretion of the trial court unless clearly prejudicial. *Id.*; *State v. Brett*, 126 Wash.2d 136, 892 P.2d 29, 41 (1995); *cf. Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 158 (1978) (in life photographs of victim with his handicapped daughter were prejudicial). We hold that it was within the sound discretion of the trial court to determine that Lilly was not prejudiced by the limited display of the in life photograph of the victim, and we find no abuse of that discretion in this instance.

Lilly assigns error to the admission of certain other photographs and the trial court's denial of his request that black-and-white photographs be substituted for color photographs. These photographs depicted the crime scene of the murder, including graphic images of the victim.

A graphic photograph is admissible so long as it is relevant and accurately portrays the scene of the crime. *Clozza v. Commonwealth*, 228 Va. 124, 135, 321 S.E.2d 273, 280 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). The admission into evidence of photographs of the body of a murder victim is left to the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion. *Williams v. Commonwealth*, 234 Va. 168, 177, 360 S.E.2d 361, 367 (1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The record shows that the trial court reviewed the photographs proffered as potential exhibits by the Commonwealth and excluded the autopsy photographs, which it found excessively graphic. We find no abuse of discretion in the admission of the crime scene photographs, since these accurately depicted the scene of the crime. Similarly, it was within the sound discretion of the trial court to determine whether the probative value of color photographs outweighed the potential prejudice of their content.

Lilly also assigns error to the admission of a videotape of the crime scene of the murder. Videotapes showing the crime scene and the victim are admissible to show motive, intent, method, malice, premeditation, and the atrociousness of the crime. *Spencer v. Commonwealth*, 238 Va. 295, 312, 384 S.E.2d 785, 796 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990); *Stamper v. Commonwealth*, 220 Va. 260, 270-71, 257 S.E.2d 808, 816 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). If the videotape accurately depicts the crime scene, it is not rendered inadmissible simply because it is gruesome or shocking. *Goins v. Commonwealth*, 251 Va. 442, 459, 470 S.E.2d 114, 126, *cert. denied*, 519 U.S. ___, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). As with other photographic evidence, the admission of a crime scene videotape rests within the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal absent a showing of abuse of that discretion. *Id.* We find no abuse of discretion in the admission of crime scene videotape here.

B. Admission of Mark Lilly's Statement

At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.

In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."

To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." *Boney v. Commonwealth*, 16 Va.App. 638, 643, 432 S.E.2d 7, 10 (1993); *see also Newberry v. Commonwealth*, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).

To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. *Chandler v. Commonwealth*, 249 Va. 270, 278-79, 455 S.E.2d 219, 224-25, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. *Id.*

Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to *Chandler*, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, *Chandler* improperly enlarged the exception to permit the Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that *Chandler* was wrongly decided and should be overturned. We disagree.

We recognize that *Ellison*, *Newberry*, and other cases that applied this hearsay exception prior to *Chandler* involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in Ellison, the admission of such statements

> must be left to the sound discretion of the trial court, *to be determined upon the facts and circumstances of each case*. But, in any case, once it is established that a third-party confession has

> been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of *Hines* [*v. Commonwealth*, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime."

219 Va. at 408-09, 247 S.E.2d at 688 (emphasis added).

Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree.

The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219-20, 27 L.Ed.2d 213 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the " 'integrity of the factfinding process.' " . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.

White v. Illinois, 502 U.S. 346, 356-57, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting

Mark Lilly's statements into evidence.[4] *See Randolph v. Commonwealth*, 24 Va.App. 345, 353, 482 S.E.2d 101, 105 (1997); *Raia v. Commonwealth*, 23 Va.App. 546, 552, 478 S.E.2d 328, 331 (1996).

Lilly further asserts that the Commonwealth was permitted to play tape recordings of Mark Lilly's statements to the jury, whereas it had only supplied Lilly with transcripts of those statements in response to Lilly's discovery request. The record reflects that the trial court offered defense counsel the opportunity to review the recordings before they were played to the jury. Assuming, without deciding, that the discovery motion and subsequent order of the trial court required disclosure of duplicate tapes rather than transcripts, we hold that Lilly was not prejudiced by the failure of the Commonwealth to do so. Having been supplied with accurate transcripts of the tape recordings prior to trial and having had an adequate opportunity to review them before they were played to the jury, there is no reasonable probability that the proceeding would have been different had duplicates of the tapes been provided to Lilly prior to trial. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985); *Robinson v. Commonwealth*, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986); *Briley v. Commonwealth*, 221 Va. 563, 576, 273 S.E.2d 57, 65 (1980).

---

[4] Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

C. Admission of Lilly's Statement to Chief Whitsett

Lilly assigns error to the admission of Chief Whitsett's testimony that Lilly said "me" when Whitsett asked Lilly "what does a murderer look like anyway?" Lilly asserts that Whitsett's conversation with him constituted a custodial interrogation prior to Lilly's having been informed of his right to counsel and his right against self-incrimination.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). Lilly's statement was clearly not the result of a custodial interrogation in that he initiated the conversation and the statement was voluntary. We hold, therefore, that the trial court did not err in permitting this statement into evidence. *Massie v. Commonwealth*, 211 Va. 429, 431-32, 177 S.E.2d 615, 617 (1970).

Lilly further asserts that Whitsett's testimony was unreliable since in preliminary testimony Whitsett testified only that he "thought" Lilly had said "me." Whitsett testified at trial that he was certain of what Lilly said. Lilly was not prohibited from cross-examining Whitsett concerning his certainty as to the statement. Thus, it was a matter for the jury to weigh and determine. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982).

D. Miscellaneous Evidentiary Rulings

Over Lilly's objection, Lieutenant Gary Price of the Giles County Sheriff's Office was permitted to testify that Lilly declined to submit to a gunpowder residue test and then began rubbing his hands together. Price testified that since he believed a gunpowder residue test constituted a search requiring a warrant or the consent of the suspect, he had informed Lilly that the test was voluntary. Price further testified that Lilly's rubbing his hands together would get rid of gunpowder residue.

Lilly concedes that he could have been required to take the test. However, Lilly contends that, because he was told that the test was "voluntary," the evidence of his refusal amounts to a use of a defendant's silence as an admission of guilt.

We will assume, without deciding, that evidence of a defendant's refusal to submit to a gunpowder residue test after having been informed, erroneously, that the test was voluntary, is inadmissible as a violation of the Fifth Amendment right against self-incrimination.[5] Under the circumstances of this case, however, that error was harmless beyond a reasonable doubt. The record shows that Lilly fired one or more of the guns taken in the breaking and entering prior to the murder. Thus, the gunpowder

---

[5] See *Herring v. State*, 501 So.2d 19, 21 (Fla.Ct.App.1986) (informing defendant that gunpowder residue test is voluntary permits defendant to refuse test). *But see Wilson v. State*, 596 So.2d 775, 777-78 (Fla.Ct.App.1992) (criticizing and distinguishing *Herring*); *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, 355 (1981) (permitting evidence that defendant refused to submit to gunpowder residue test without attorney present).

residue test would have been positive for that reason alone, and the jury was aware of that circumstance. In addition, we hold that Lilly's act of rubbing his hands together in an apparent attempt to destroy any gunpowder residue on his hands was a nonverbal act that went beyond the mere refusal to submit to the test and, as such, was not subject to exclusion under the right against self-incrimination. *Accord Salster v. State*, 487 So.2d 1020, 1021 (Ala.Crim.App.1986) (defendant's nonverbal conduct in secreting contraband was not constitutionally protected); *see also Stevenson v. Commonwealth*, 218 Va. 462, 465, 237 S.E.2d 779, 781 (1977) (nonverbal conduct may be treated as an assertion).

Lilly also assigns error to the admission of evidence that dried blood was found on the back of his pant leg. Lilly contends that the location of the bloodstain was inconsistent with its having resulted from the murder because the Commonwealth alleged Lilly was facing the victim at the time Lilly shot the victim. Lilly further asserts that no test was conducted to determine whether the blood was of human origin, and that it is as likely that this blood came from the geese that the men shot earlier in the day. Therefore, he asserts that the trial court abused its discretion in admitting this evidence. We disagree.

The presence of bloodstains on Lilly's clothing was probative, however slightly, of his involvement in the murder. The lack of a scientific determination that the blood was from a human source was a matter of the weight and credibility, if any, of that evidence for the jury to consider. The record does not show that Lilly was

prohibited from questioning the Commonwealth's witnesses on this matter. Accordingly, we hold that admission of this evidence was not error.

Lilly objected to the introduction of the medical examiner's report on the ground that it contained references to tests not performed by the proponent of the report. The Commonwealth responds that the trial court excluded from evidence a local medical examiner's report, admitting only the report prepared by the proponent or his staff. To the extent, if any, that the contents of the report admitted fell outside the exception to the hearsay rule provided for medical examiners' reports under Code § 19.2-188, we hold that Lilly has failed to show how any of that material was prejudicial and not merely cumulative of properly admitted evidence, and that in light of the other proof in the record, its admission was harmless beyond a reasonable doubt. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 807 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983).

Lilly assigns error to the trial court's refusal to admit a statement made by Barker to a friend to the effect that Barker would be able to kill his best friend and feel no remorse. The record reflects, however, that Lilly initially objected to the statement's admission, then later sought its admission over the Commonwealth's objection. After the Commonwealth subsequently withdrew its objection, the trial court reversed its ruling to exclude the statement, but Lilly failed to recall the witness. Accordingly, we hold that this issue was not properly preserved for review.

E. Witness Sequestration Issue

Barker, who had not been present when the trial court admonished the other witnesses to refrain from reading or observing media reports about the trial, testified that he had read a newspaper article the morning before he testified. The trial court reviewed the article and questioned Barker, who testified that nothing in the article affected his testimony. Lilly assigns error to the trial court's refusal to strike Barker's testimony.

Sequestration of witnesses is not a right, but a power wholly within the discretion of the trial court. *Hampton v. Commonwealth*, 190 Va. 531, 553-54, 58 S.E.2d 288, 297 (1950). We cannot say that the trial court abused its discretion in refusing to strike the evidence of a witness who was not aware of the sequestration order and testified that the exposure to the newspaper article did not affect his testimony.

F. Jury Instruction Issue

Lilly assigns error to the trial court's refusal to grant his proposed instruction on voluntary intoxication. The facts, however, did not warrant the proposed instruction.

> Generally, voluntary intoxication is not an excuse for any crime. The only exception to this general rule is in cases involving deliberate and premeditated murder. Mere intoxication will not negate premeditation. However, when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing.

Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988) (citations omitted).

Here, Lilly was able to operate an automobile both before and after the murder. During his flight immediately after the murder, he committed robberies to facilitate his continued flight and took steps to deliberately conceal his involvement in the murder. All of these actions suggest that he was fully in command of his faculties and acted with deliberation. Nothing in the evidence suggests that he was so intoxicated as to be unable to form the requisite intent to commit premeditated murder. Accordingly, the trial court properly refused the proffered instruction on voluntary intoxication.

G. Prosecutorial Misconduct

Lilly assigns error to the trial court's refusal to grant a mistrial after the Commonwealth's Attorney allegedly pointed the murder weapon at Lilly and his counsel during closing argument. After making a cursory statement that the action of the prosecutor was prejudicial, Lilly addresses the remainder of his argument to the trial court's statement, "[T]hat's ridiculous. [The gun is] not pointed at you . . . nor is it pointed at anyone in this Courtroom," contending that it was an intentional disparagement of Lilly's counsel. This argument was not raised below, and may not be raised for the first time on appeal. Rule 5:25.

VII.

PENALTY PHASE ISSUES

Lilly assigns error to the trial court's refusal to grant a penalty phase instruction directing the jury to consider "residual doubt" of guilt in considering the sentence. We have previously held that such an instruction is inappropriate. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207. Lilly also sought an instruction directing the jury to "impose the lower grade" of punishment if there was a reasonable doubt as to the grade of punishment to be imposed. The trial court properly ruled that this instruction was both confusing and redundant of an instruction already accepted by the trial court which directed the jury that the Commonwealth was required to present evidence beyond a reasonable doubt of the existence of one or both of the aggravating factors necessary for imposition of the death penalty.

VIII.

SENTENCE REVIEW

Under Code § 17-110.1(C)(1) and (2), we are required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Lilly makes no particularized argument that passion, prejudice, or any other arbitrary factor influenced the

jury's decision, and we find nothing in the record that would support such a finding.

In conducting our proportionality review, we must determine "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). We have examined the records of all capital murder cases reviewed by this Court, including those cases in which a life sentence was imposed. We have given particular attention to those cases in which, as here, the death penalty was based on both the "future dangerousness" and the "vileness" predicates.

Based on this review, we conclude that Lilly's death sentence is not excessive or disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes. *See, e.g., Gray*, 233 Va. at 354, 356 S.E.2d at 180; *Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294, *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

IX.

CONCLUSION

We find no reversible error in the judgment of the trial court. Having reviewed Lilly's death sentence pursuant to Code § 17-110.1, we decline to commute the sentence of death. Accordingly, we will affirm the trial court's judgment.

Affirmed.

IN THE SUPREME COURT OF VIRGINIA
at Richmond

BENJAMIN LEE LILLY, Appellant, v. COMMONWEALTH OF VIRGINIA Appellee.	)	Record Nos. 972385 & 972386

PETITION FOR REHEARING

COMES NOW the Appellant, Benjamin Lee Lilly, by counsel, and pursuant to Rule 5:39 of the Rules of the Supreme Court of Virginia petitions this Court for a rehearing on the issues described below.

I. THE COURT ERRED IN UPHOLDING THE ADMISSION OF MARK LILLY'S OUT OF COURT STATEMENT

This Court's conclusions regarding the admissibility of Mark Lilly's out of court statements were unreasonable conclusions of law and applications of fact, and left uncorrected violations of Benjamin Lilly's Sixth Amendment right to confrontation and Fourteenth Amendment right to due process.

Case after case in the Supreme Court of the United States makes clear that portions of hearsay declarants' statements which are inculpatory of the accused must be subject to the Sixth Amendment right to confrontation and cross-examination. In *Douglas v. Alabama*, 380 U.S.

415 (1968), the Supreme Court held that the prosecutor's reading of a nontestifing codefendant's statement inculpatory of the accused under the guise of refreshing his recollection violated the Confrontation Clause. The Court later recognized that the violation in *Douglas* was not as serious as it was in a case in which the statement was actually offered as substantive evidence. *Bruton v. United States*, 391 U.S. 123 (1968). In that case, like Lilly's. the codefendant's statement was admitted as substantive evidence.

> Even greater, then, was the likelihood that the jury would believe [the declarant] made the statements and that they were true – not just the self-incriminating portions but those implicating Petitioner as well. Plainly, the introduction of [the declarant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since [the declarant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Bruton, 391 U.S. at 127-128. The Court reiterated its objections to the use of a codefendant's hearsay statements as substantive evidence against the accused in *Lee v. Illinois*, 476 U.S. 544 (1986) (Sixth Amendment violated where presumptively unreliable statement of codefendant introduced against accused at joint bench trial).[1] Despite this

---

[1] This Court relies on *Raia v. Commonwealth*, 23 Va. App. 546, 478 S.E.2d 328 (1996), in support of its conclusion that the trial court's admission of Mark Lilly's statement was not in error. The *Raia* Court attempts to avoid the clear dictates of *Bruton* and *Lee* by arguing that those cases involved joint trials.

clear guidance from the Supreme Court, this Court found Mark Lilly's statements admissible.[2]

a. The statement against interest exception is not "firmly rooted"

Hearsay may be admitted without violating the Confrontation Clause if it falls into a "firmly rooted" hearsay exception. *Ohio v. Roberts*, 448 U.S. 56 (1980). No "firmly rooted" exception is present in Lilly's case. Those exceptions which the Supreme Court has deemed to be "firmly rooted" are those which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection [of the Confrontation Clause]'." *Ohio v. Roberts*, 488 U.S. at 66 (1980), *quoting Mattox v. United States*, 156 U.S 237, 244 (1895). As this Court noted, "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." Slip Op. at 21,

---

Id. at 549, 478 S.E.2d at 330. In neither case did the Supreme Court provide such a basis for limiting their holdings. It is clear that the damage done by the inability to cross-examine a witness against the accused is unaffected by whether or not the witness is being tried in the same action. Each and every argument underlying *Douglas*, *Bruton*, and their progeny is applicable to the instant case.

[2] Without acknowledging *Douglas*, *Bruton*, or *Lee*, this Court relies on *White v. Illinois*, 502 U.S. 346 (1992). *White*, however, does not concern the presumptively unreliable statements of a codefendant. *White* considers only whether to impose an unavailability requirement on the hearsay exceptions of excited utterance and statements made in the course of medical treatment.

quoting White v. Illinois, 502 U.S. 346, 357 (1992). The Supreme Court has found numerous hearsay exceptions to be firmly rooted. *Ohio v. Roberts*, 448 U.S. at 66 n. 8 (dying declarations, business records, public records) (internal citations omitted)); *California v. Green*, 399 U.S. 149, 165-168 (1970) (preliminary hearing testimony); *Manchus v. Stubbs*, 408 U.S. 204, 216 (1972) (prior trial testimony); *Mattox v. United States*, 156 U.S. 237, 244 91985) (first trial testimony). The Supreme Court has not found, however, that the statements against interest exception qualifies for this status. *Williamson v. United States*, 512 U.S. 594, 605 (1994).

In fact, far from suggesting such statements are inherently reliable, the Supreme Court has found that statements of codefendant shifting blame to other defendants are *presumptively unreliable*. *Lee v. Illinois*, 476 U.S. at 543. A presumptively unreliable statement cannot be the basis of a "firmly rooted" hearsay exception. *See, e.g., Douglas v. Alabama, supra*, 380 U.S. 415; *Bruton v. United States, supra*, 391 U.S. 123; *Lee v. Illinois, supra*, 476 U.S. 544; *Williamson v. United States, supra*, 512 U.S. 594.

b. Mark Lilly's statement was not a statement against interest

Even if the statement against interest exception is deemed to be firmly rooted, this Court's conclusion that those portions of Mark Lilly's statements exculpating himself and inculpating Benjamin Lilly as the triggerman

constituted statements against interest is patently unreasonable[3]. The notion that statements against interest should be admitted as hearsay is grounded in the belief that reasonable people will not make self-inculpatory statements that are not true. *See Williamson v. United States*, 512 U.S. at 603-604. Thus, there is no basis to vest self-*ex*culpatory statements with *any* indicia of credibility not afforded ordinary hearsay. The suggestion that these exculpatory statements are somehow more credible as a result of their proximity to inculpatory statements has been expressly rejected by the Supreme Court. "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson v. United States*, 512 U.S. at 599.[4]

---

[3] Lilly notes that the Commonwealth retains a great deal of control over whether a criminal defendant will be unavailable for purposes of invoking the statements against interest exception. If the Commonwealth believes that the value to the prosecution of one codefendant's statements will diminished by exposure to cross-examination, it can simply delay the codefendant's trial him that when he takes the stand in his codefendant's trial he will avoid cross examination by invoking his right to silence. The prosecution thereby gains the advantage of admitting the statement without exposure to cross-examination.

[4] This Court has attempted to avoid the dictates of *Williamson*, which held that a statement like Mark Lilly's was not admissible under the federal rules, by arguing that the entire decision was inapplicable because it was based on a federal rule. *Chandler v. Commonwealth*, 249 Va. 270, 279, 455 S.E.2d 219, 225, *cert. denied*, 516 U.S. 889 (1995). Such reasoning may be persuasive with regard to any Confrontation Clause arguments, but the Court's language regarding the meaning of the statements against interest exception is still persuasive.

The Supreme Court has held that statements of codefendants are "presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread the blame, curry favor, or divert attention to another." *Lee v. Illinois*, 476 U.S. at 545. As Justice O'Connor has pointed out "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially the truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States*, 512 U.S. at 599-600. Mark Lilly was trying to shift blame to Benjamin Lilly for the far more serious crimes while he implicated himself in more minor criminal activity. That is clear, not only from his statement, but also from the fact that *Mark Lilly admitted that was his intention*. A. 3096. As the Court found in *Lee*,

> Even Justice Harlan, who was generally adverse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption."

Lee v. Illinois, 476 U.S. at 541-542, quoting *Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring). Mark Lilly's testimony has withdrawn any basis the Court could have for assuring his authorization or adoption of the original statement. His testimony is also is powerful evidence of the effect cross-examination would have had to benefit Lilly.

c. This Court's analysis of reliability was flawed

This Court held that Mark Lilly's statement was reliable because aspects of the statement were "independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities." Slip op. at 20 (no record citations provided). The Supreme Court has expressly held that such comparisons of the out of court statement with other evidence are insufficient to find the statement reliable. *Idaho v. Wright*, 497 U.S. 805 (1990). The Court held that to support a statement's reliability on this basis "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial," and that the existence of such collateral corroboration "would be no substitute for cross-examination of the declarant at trial." *Id.* at 823. The *Wright* court concluded that the reliability of the out of court statement must be based on the "totality of the circumstances that surround the making of the statement." *Id.* at 820. Subject to this proper test, the unreliability of Mark Lilly's statement is manifest. The record reflects that Mark Lilly made his statement because he was scared when the interrogating officer began to threaten him with life sentences and decided to "(t)hrow it off on somebody else." A 3096. Furthermore, any reliance by this Court on *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.2d 843 (1923), is misplaced. In *Hines*, this Court determined that a statement against interest was admissible so long as there was something "substantial other than the bare confession to connect the declarant

with the crime." *Id.* at 748, 117 S.E.2d at 849. This standard was obviously intended to govern the admissibility of confessions of declarants which exculpated the accused. Because the government, against whose case such a statement would be admitted, has no constitutional right to confrontation, such a forgiving standard is appropriate. A standard governing admission of statements which will divest the defendant of his constitutional right to confront the witnesses *against* him, however, must surely be higher.

d. Mark Lilly's statement does not bear sufficient indicia of reliability under any test

Even It the Court determines it was correct to consider external evidence to determine the reliability of Mark Lilly's statement, its conclusion based on the facts was absolutely unreasonable.[5] The Court makes its bare conclusion that Mark Lilly's statement is corroborated by other evidence without any citation to or support in the record. In fact, the record contradicts this Court's conclusion in many respects.

First, Mark Lilly's statement is *not* consistent with the physical evidence at the scene. The only physical evidence at the scene was the victim's glasses and Mark Lilly's money clip. A. 1591-92, 1605. Mark Lilly stated,

[5] Lilly notes that this Court was unable to make a reasonable determination of the totality of the circumstances on appeal as it is prohibited from considering any facts not favorable to the Commonwealth. Slip Op. at 3.

however. that he never got out of the car while at the scene.

Second, Mark Lilly's statement is *not* consistent with Gary Barker's testimony. Mark Lilly stated that he was unaware of how the victim became undressed because he (and Barker) never exited the car. Gary Barker stated that be and Mark Lilly both exited the car and laughed at the victim's state of undress. A. 2062. Mark Lilly stated that the victim was shot from a distance of ten to fifteen yards. A. 2268. Gary Barker stated that the victim was shot at point blank range. A. 2148.

Third, the Court's assessment of the credibility of Mark Lilly's statement ignores entirely Mark's Lilly's own testimony that he *made the statement because he was scared and wanted to put the blame onto somebody else.* A. 3096.

II. THE COURT ERRED REGARDING THE VOIR DIRE OF JURORS REGARDING PAROLE INELIGIBILITY

The trial court's refusal to allow Lilly to voir dire the jury regarding the possibility of a sentence of life without parole violated three interrelated, fundamental requirements in death penalty cases: reliability. mitigation, and confrontation. *See Skipper v. South Carolina,* 476 U.S. 1 (1986); *Lockett v. Ohio,* 438 U.S. 586 (1986); *Gardner v. Florida,* 430 U.S. 349 (1977). It is a well established Eighth Amendment requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death penalty]." *McCleskey v. Kemp,* 481 U.S. 279, 306 (1987); *Lockett,* 438 U.S. at 605; *Skipper,* 476 U.S. at 5. "[The Court

has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Walton v. Arizona*, 497 U.S. 639, 649 (1990); *see also Mills v. Maryland*, 486 U.S. 367, 374-75 (1988) ("[T]hat 'the sentencer may not . . . be precluded from considering "any relevant mitigating evidence" ' is . . . 'well established.' ") (citations omitted); *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("[T]he jury [should] have as much information before it as possible when it makes the sentencing decision.").

Counsel and the court must be able to ensure that jurors will be selected who are able to give effect to mitigating evidence. *Mills v. Maryland*, 486 U.S. 267 (1988). Refusal to permit counsel to inquire of the jurors regarding parole also creates an impermissible risk that jurors will be seated who will impose a sentence based on extrinsic and erroneous information. Instruction or argument in this regard is not sufficient. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Morgan v. Illinois*, 504 U.S. 719 (1992). A juror might sit

* * *

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* June, 1998.

Benjamin Lee Lilly, Appellant,

against Record Nos. 972385 and 972386
Circuit Court No. 13636

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 17th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ Illegible
Clerk

UNITED STATES SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 9, 1998

Clerk
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219

Re: Benjamin Lee Lilly
v. Virginia
No. 98-5881
(Your No. 972385, 972386)

Dear Clerk:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

William K. Suter, Clerk